LIBRARY
SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1954

No. 70

BOSTON METALS COMPANY, FORMERLY NAMED BOSTON IRON AND METAL COMPANY, AS OWNER OF THE CANADIAN DESTROYER "ST. FRANCIS", PETITIONER,

vs.

S/S "WINDING GULF" AND MASSACHUSETTS TRUSTEES OF EASTERN GAS AND FUEL ASSOCIATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 10, 1954

CERTIORARI GRANTED OCTOBER 14, 1954

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 70

BOSTON METALS COMPANY, FORMERLY NAMED BOSTON IRON AND METAL COMPANY, AS OWNER OF THE CANADIAN DESTROYER "ST. FRANCIS", PETITIONER,

vs.

S/S "WINDING GULF" AND MASSACHUSETTS TRUSTEES OF EASTERN GAS AND FUEL ASSOCIATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

INDEX

	Original	Print
Record from the U.S.D.C. for the District of Maryland	1	1
Docket entries and pleadings (omitted in printing)	1	
Opinion, Chesnut, J.	30	1
Interlocutory decree	46	14
Excerpts from transcript of proceedings	78	15
Testimony of Morris Schapiro	78	15
Testimony of Captain Paul F. Cullison	163	17
Colloquy	355	19
Libellant's Exhibit 1—Letter from Foundation Maritime Limited to Boston Iron & Metal Co. dated July 3, 1945 and copy of Standard Towing Conditions	506	21
Libellant's Exhibit 2—Deposition of Royden Wilbour Dykeman	511	24

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOV. 18, 1954.

—8597

	Original	Print
Record from the U.S.D.C. for the District of Maryland—Continued		
Libellant's Exhibit 3—Deposition of Ira F. George, Jr.	550	35
Findings and opinion on damages, Chesnut, J.	909	42
Final decree	921	53
Petition for appeal, etc. (omitted in printing)	925	
Proceedings in U.S.C.A. for the Fourth Circuit	938	56
Docket entries	938	56
Minute entry of argument and submission (omitted in printing)	938	
Opinion, Soper, J.	939	57
Decree	946	64
Petition for rehearing	948	65
Order staying mandate	954	69
Order denying rehearing	954	69
Clerk's certificate (omitted in printing)	956	
Order granting certiorari	957	70

[fols. 1-30]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

No. 2757

BOSTON IRON & METAL COMPANY, as Owner of the Canadian Destroyer "St. Francis",

v.

S. S. WINDING GULF, Her Engines, Boilers, etc., and MASSACHUSETTS TRUSTEES OF EASTERN GAS & FUEL ASSOCIATION

OPINION—Filed June 10, 1947

IN ADMIRALTY

CHESNUT, District Judge:

This case grows out of a collision at sea between the "SS Winding Gulf" and an obsolete "Destroyer" being towed in tandem with another old Destroyer, both belonging to the Boston Iron & Metal Company, a Maryland corporation, which had recently purchased them from the Canadian Government for scrapping. The place of the collision was in the open waters near Buzzards Bay, Massachusetts. The time was about 10 P. M. (E. W. T.) July 13, 1945.

The Boston Company had entered into a towing contract dated July 3, 1945, with the Foundation Maritime, Ltd., a Canadian towing corporation, to furnish motive power for towing the two Destroyers from Sydney, Nova Scotia, to [fol. 31] Baltimore, Maryland, by way of the Cape Cod Canal around Block Island (off the east coast of Long Island), the Delaware Bay and the Chesapeake and Delaware Canal to Baltimore. The voyage from Sydney through the Cape Cod Canal was without incident. After traversing the Canal the tow was reassembled in charge of a tug (the Peter Moran) furnished by the Moran Towing Company of New York for Foundation Maritime, Ltd. To the towing contract were annexed printed conditions which included the following: "The master and crew of such tug or tugs used in the said services become the servants of and identified with such vessel or craft and their owners, and

that the Tug Company only undertakes to provide motive power."

As a result of the collision the particular Destroyer known as the "I-24" subsequently sank and became a total loss. There was also some substantial damage to the stem of the Winding Gulf. On November 14, 1945, the Boston Company filed its libel in this court against the Winding Gulf to recover damages for the loss of the Destroyer. The Massachusetts Trustees of Eastern Gas & Fuel Association filed a claim in the case as owner of the Winding Gulf, and also a cross-libel in personam against the Boston Company. They have also filed and there is now pending a libel against the tug Moran or its owner, in the Southern District of New York. Answers were filed by the respective respondents to the claims in this court and extensive testimony has been taken and arguments of counsel have now been heard.

As is frequently the case in maritime collisions of this nature, there is much controversy and uncertainty as to the precise conditions and causes of the collision. In this case [fol. 32] the evidence is conflicting with respect to (1) whether the hawser connecting the Destroyer with the tow had parted before the collision; (2) whether the Destroyer had proper lights and was properly manned before and at the time of the collision; (3) whether the Winding Gulf was justified in maintaining her course, direction and speed shortly before the collision by reason of the fog; (4) the density of the fog at the time and (5) whether the length of the tow from the tug was unreasonably long for the time and place. The difficulty in determining the precise and actual facts is enhanced in the particular case by (a) the absence of any person or persons as a crew on board the Destroyer at the time of the collision; (b) the entire absence of any evidence to show where or how the hawser was parted other than the probable result of the collision and (c) the fact that the evidence of the principal witnesses for the Boston Company was necessarily taken by deposition instead of in court.

In reaching a conclusion as to the ultimate facts it will be helpful to first state such of the facts of the case as are definitely and clearly established without substantial contradiction.

The tug was of adequate size and power for the towing. The Winding Gulf was a steam vessel of the three island type of superstructure, about 400 feet long, 55 foot beam and 35 foot depth carrying a cargo of coal from Newport News, Virginia, through Long Island Sound by way of the Cape Cod Canal to Boston. The two Destroyers were in tow in tandem. They consisted of the "I-93", the first in the tow, and the "I-24", the second and last vessel in the tow. The I-93 was connected with the tug in the usual adequate way first by a wire pennant 50 feet long and a new 11-inch manila [fol. 33] hawser. In turn the I-24 was connected with the I-93 by similar wire pennant and a 10-inch hawser about 5 to 6 months old but in good condition. The Destroyers were each about 300 feet in length. The length of the tow line from the tug to the first Destroyer was 250 fathoms (1500 feet) and the length of the tow line from it to the I-24 was 200 fathoms (1200 feet). With the length of the two Destroyers the whole tow from the tug to the stern of the I-24 was thus about 3300 feet, or about three-fifths of a mile. Neither Destroyer had any member of a crew on board, neither had any motive power, and both were "dead" ships.

Shortly before the collision the course and direction of the tug was southwest by west; while the course of the Winding Gulf was east by one-half north. The Winding Gulf was displaying the usual navigation lights for a vessel of her class and size. The tug displayed, among other lights, three white lights vertically arranged signifying a tow in the rear. The lights did not indicate how may vessels were in tow nor the length of the tow. The first Destroyer in the tow line had one white light displayed in proper place; the second Destroyer had two lights, one white and the other intended to be white, in proper place, indicating that it was the last vessel in the flotilla. A fog set in between 8 and 9 o'clock P. M. The master and deckhand on the tug testified that they saw the lights on both Destroyers just before the fog shut them out, about 9 P. M., shortly after the tug passed Hen and Chickens Lightship.

Fog signals were being sounded both by the Winding Gulf and the tug. The two vessels heard each other's fog signals and also saw their respective lights when the Winding Gulf was about half a mile to the west of the tug, and two points on the starboard bow of the tug. When the two

vessels came abreast of each other the Winding Gulf was about a quarter of a mile distant to the north of the tug. The tug was proceeding about southwest and the Winding Gulf nearly due east. The speed of the tug was about 4 [fol. 34] knots an hour and that of the Winding Gulf about 6 knots per hour. In this situation it is fairly apparent that the course of the Winding Gulf, unless changed, would intersect the flotilla at some point. The Winding Gulf did not change either its speed or its course with the exception that shortly thereafter the master changed his course for three or four minutes to one point to the north, not for the purpose of avoiding the tug or tow but because he desired to steer somewhat closer to the buoys on his north. The master of the Winding Gulf, who was on the bridge at the time, frankly admitted that he did not know or suspect the length of the tow line, and thought a quarter of a mile distance between his ship and the tow was quite sufficient to clear the tow, especially after he had looked for and failed to see anything in tow of the tug through his binoculars.

The exact time when the two ships came abreast as above described is uncertain. The master of the Winding Gulf, Captain Godfrey, testified that he had passed on his north "U" buoy at 9:21 P. M. as recorded on the ship's log; that he saw the lights of the tug a few minutes thereafter, at say 9.25, and that he was abreast of the tug and passed it about 9.35. From "U" buoy to the next buoy "V" was two and one-half miles. He passed "V" buoy at 9:45 according to the log time, and the collision with Destroyer I-24 occurred at 9.54 by the clock on the bridge and 9.51 by the engine room clock, which, it is said, was three minutes slower. Immediately before the collision occurred the lookout on the Winding Gulf, about 125 feet forward from the bridge, sounded the bell and ran down the ladder and called to the bridge that there was an object dead ahead. Before the lookout could get back to his post the collision had occurred. The stem of the Winding Gulf struck the starboard aft side of the Destroyer. The lookout had seen no lights on the Destroyer before the collision but immediately thereafter did see what he described as a dim red light at the mast-[fol. 35] head and another dim white light on the other side of the yardarm. Immediately on notice of imminent collision the master telegraphed the engine room to stop the

engines. The time recorded on the engine room clock was 9.51. After the collision others on the Winding Gulf also saw the lights mentioned on the Destroyer. The adequacy of these lights will be later discussed. At 10.10 P. M. the Winding Gulf sent a radio message to the Coast Guard. In it the radio operator described the fog at that time as a "dense fog". The Coast Guard responded and endeavored to tow the Destroyer to land but she sank before reaching land. Before pulling away from the Destroyer Captain Godfrey ascertained that there was no one on board the Destroyer by numerous loud blasts of the ship's whistle. He also ascertained that his own ship had been damaged and was slowly leaking forward. He then proceeded to put her in a position of safety before continuing the voyage.

We return now to the activities of the tug upon first seeing the lights of the Winding Gulf half a mile to the west. The tug had a crew of about 15 men but only the master, a Captain George, and a deckhand, one Mackey, were on deck. The depositions of both were taken. The master testified that on sighting the Winding Gulf he blew two blasts of the whistle to signify an intended starboard passage, and received a similar confirmation from the Winding Gulf. When the vessels were abreast he feared that the course of the Winding Gulf would intersect the tow and thereupon, as he testified, he sounded the danger signal on the tug's whistle. He also said that the tug in addition to the three vertical white lights indicating a tow, had two red lights displayed which he said was a warning light about the tow or indicated a tow not under complete control. Pursuant to the signals for a starboard passage he changed his course about four points to the south but noticed that the Winding Gulf did not change her course. A few minutes after pass-[fol. 36] ing the Winding Gulf (estimated by Mackey as about four or five minutes) he noticed that the tug was picking up speed and immediately inferred that one of the Destroyers was off the tow line and telephoned or radioed for help to the Coast Guard. He then circled around for several hours but did not learn until the next morning what had happened.

The most important fact in controversy is whether the hawser of the Destroyer had parted before the collision. On behalf of the Winding Gulf it is contended that it had

and that the Destroyer was at the time of the collision a "dead" ship, loose and adrift without crew, motive power or adequate lights. There is no physical evidence in the case where or when or how the hawser parted and the Destroyer thereupon became disconnected from the tow other than the reasonable inference that the parting of the hawser was due to the impact of the collision. The contention on the part of the Winding Gulf that the hawser had parted and the Destroyer was loose and adrift prior to the collision is based solely on estimates of time and distance by Captain Godfrey. Reliance is placed on the circumstantial evidence that there must have elapsed a period of time variously estimated at 9 to 15 minutes or more between the time of passing the tug and the collision. More specifically, the argument is that as the Winding Gulf was making 6 knots per hour, or about a mile in ten minutes, it would necessarily have struck the Destroyer or some part of the tow line within less than 9 minutes after passing the tug if the second Destroyer had still been on the tow line connected with the first Destroyer, because the tow line was only about three-fifths of a mile long. There is also some little additional circumstantial evidence brought forward on behalf of the Winding Gulf in support of its contention. Thus, it is said that at the time of the collision it did not definitely appear that the Destroyer was going forward in [fol. 37] the water and, perhaps less importantly, it is suggested that if the tug had been only three-fifths of a mile distant at the other end of the tow line at the time of the collision the master of the tug must have heard the loud blasts from the Winding Gulf just after the collision.

Counsel for the Winding Gulf also submits an argument implemented by superimposing on a chart of the waters in question, a diagram of the course of the Winding Gulf and the tug respectively said to be based on the evidence given by their respective captains, to the effect that the course of the Winding Gulf would not and could not have intersected the tow line. The course of the Winding Gulf so diagramed seems to be correct from the evidence; but the course of the tug as so plotted is based on uncertain assumptions, and I am not able to say in view of the uncertainties, that the thus projected course of the tug is correctly outlined in the diagram.

I have given careful consideration to the several contentions made on behalf of the Winding Gulf that the I-24 had broken loose from the flotilla at the time of the collision, but weighing the evidence as a whole I have reached the contrary conclusion. There are several important considerations which lead to this conclusion: (1)There is no direct or definite evidence that the hawser of the I-24 had parted before the Winding Gulf and the tug came abreast of each other; (2) the collision occurred certainly within a few minutes after this point of time; (3) the sea was calm with little or no wind; (4) the hawsers in the tow line were adequate and in good condition; (5) it is quite improbable that the hawser parted in the very few minutes elapsing between the passage of the two vessels; (6) the stated course of the Winding Gulf would apparently have intersected the flotilla at some point in a few minutes in view of the distances and courses of the Winding Gulf unless changed; (7) and it is quite significant that Captain Godfrey, on the bridge of the [fol. 38] Winding Gulf, testified that if he had known the length of the tow line he would have altered his course. The main contention of the Winding Gulf is based on the estimated elapsed time between the passage of the two vessels and the subsequent collision. It is true that Captain Godfrey's testimony seems precise and the calculations based thereon, if the time of the passage of the two ships is accepted as given by him, would lead to the conclusion that the elapsed time was greater than would have occurred if the flotilla had been intersected by the Winding Gulf. But the uncertain point in the evidence of Captain Godfrey is as to the time of the passage of the two ships; and on this particular point I accept the simpler testimony of the Captain and deckhand of the tug, which was to the effect that within four or five minutes after the two ships were abreast they noted that the tug was picking up speed, from which the fair inference, subsequently confirmed by the discovered fact, was that the tow line had parted. And this is entirely consistent with the courses and distances of the vessels.

On the affirmative side I conclude that the explanation given by the master and deckhand of the tug is more reasonable and probable. While not based on recorded time elapsing nor matematical computations, it seems to me

more probable in view of the known facts. It was to the effect, as previously mentioned, that within a few minutes after the two ships had passed each other it was noticed the tug was picking up speed. In view of the known length and course of the tug and the speed and course of the Winding Gulf, it is clear that the Winding Gulf must have intersected the three-fifths of a mile tow line within five or six minutes after passing the tug. There is no fixed point of time by any one as to just when this passage did take place. In view of the whole situation, I think the sounder view is to accept the evidence of the master and deckhand, of the [fol. 39] tug on this point. I therefore find that the Destroyer was still on the tow line at the time of the collision.

The only clear and effective cause of the parting of the hawser shown by the evidence was the collision. And this was a reasonably adequate cause. The Winding Gulf was heavily laden with a cargo of coal. Her speed was 6 knots per hour and at that speed she could not be stopped in less than a quarter of a mile. She struck the Destroyer within less than a minute after the lookout sighted her. She remained interlocked with the hulk of the destroyer for several minutes thereafter. Assuming the hawser holding the Destroyer was partly slack in the water at the moment of the collision, the forward motion of the ship due to the impact doubtless tautened and snapped the hawser.

Another important controverted matter is whether the master of the Winding Gulf was at fault in not changing either speed or course on passing the tug. He knew that the tug had a tow behind but did not know the number of vessels in tow nor the length of the tow. He was unable to locate the tow at any time through his binoculars. He says that he heard no whistle signals from the tug other than the usual fog signals and those which indicated the tug had a tow. He saw, at one time at least, a red light on the tug but assumed it was probably the usual port light. Later he failed to see even that. He also said that he heard no danger signals from the tug. He did, however, frankly concede that he would have changed his course had he known the length of the tow line. He says he assumed that the length of the hawser from the tug to tow would be not more than 75 fathoms or 450 feet, in accordance with the inland rules

of navigation; but he did not know or learn how many vessels might be in tow with 75 fathoms lines. The inland rules permit four such tows in tandem with an aggregate of possibly more than 2000 feet of towage, nearly half a [fol. 40] mile,[1] and indeed the rule does not absolutely limit the length of the tow line in any case because it provides for the exercise of the judgment and discretion of the master of the towing vessel with respect to the length of the hawser, with exceptions as to certain named localities not including the waters where this collision occurred. The master of the Winding Gulf should have known that his course unless changed might intersect the flotilla at some point. When, after passing the tug, he could not pick up any part of the flotilla through his binoculars, he still did not change his course or slacken his speed. He said he assumed he had

---

Note 1: Authority for the regulations with respect to navigation of inland waters, which is here applicable, is to be found in 33 USCA, s. 152 which presently authorizes the Coast Guard to promulgate such regulations. In accordance therewith the length of tow lines of seagoing barges within inland waters is to be found in "Comparative Rules of the Road", published by the United States Coast Guard, 1946, page 90, which reads:

"*Tows of seagoing barges within inland waters.*—Tows of seagoing barges navigating the inland waters of the United States are limited in length to five vessels, including the towing vessel or vessels.

Hawser length; general.—With the exception noted below, hawsers are limited in length to 75 fathoms, measured from the stern of one vessel to the bow of the following vessel; and should in all cases be as much shorter as the weather or sea will permit.

Hawser length; exceptions.—In all cases where, in the opinion of the master of the towing vessel, it is dangerous or inadvisable, whether or account of the state of the weather, or sea, or otherwise, to shorten the hawsers, hawsers need not be shortened to the prescribed length, except that hawsers must in any event be shortened to the prescribed length upon reaching the applicable locality named below:"

passed the tow. This assumption was hardly a prudent one to make.

There is further uncertainty as to the density of the fog. The Captains of both the steamer and the tug said that the visibility as to the lights (not as to the bulk of the ships) was half a mile despite the fog; but other witnesses, possibly less experienced in navigation, described the fog as "dense". The inland rules require slackening of speed in fog, dependent upon its density, of course, sufficiently to insure safety and avoidance of collision.[2]

[fol. 41] On the whole evidence I find as a fact that the Winding Gulf was at fault in maintaining her speed and course without change, and this was a proximate cause of the collision. She is therefore liable to the Boston Company for damages to the Destroyer unless there was clearly contributing fault of the tow.

The faults attributed to the Destroyer by the Winding Gulf are (1) that the flotilla was longer than permitted by the rules of navigation; (2) that the Destroyer was not properly manned by a crew and (3) she did not carry adequate lights.

With respect to the alleged improper length of the flotilla, it has been pointed out above that there is no absolute rigid length for tow lines. There is also affirmative evidence in this case by a tug captain, Cullison, who had been employed by the Boston Company for about a year after the collision and had successfully towed ten or more similar old destroyers from Canada to Baltimore, that it was the usual practice to tow them in tandem on hawsers of similar length to that used in the instant case and through these same waters. But it is also to be noted that as the tow line was of unusual length that fact imposed on the tug and tow the obligation to use great care to avoid accident. The Gladiator, 79, F. 445; 446; The Mt. Hope, 82 F. 910, 912; The

---

Note 2: "Every vessel shall, in fog, mist, falling snow or heavy rain storms, go at a moderate speed having careful regard to the existing circumstances and conditions." "Comparative Rules of the Road", published by the United States Coast Guard, p. 69 (former Pilot Rule 13); See also 33 USCA, s. 157.

Samuel Dillaway, 98 F. 138, 141; The Gertrude, 118 F. 130, 131; The Admiral Schley, 131 F. 433, 434; The H. M. Whitney, 86 F. 697, 700. This emphasizes the importance of a crew on the Destroyer to see that the lights were kept sufficiently brightly burning, and at least suggests the desirability of a crew equipped with whistle or fog horn to warn of the presence of the Destroyer in the unusually long flo- [fol. 42] tilla. There is positive evidence of several witnesses for the Winding Gulf that the lights on the Destroyer at the time of the collision were inadequate. The dim red light referred to probably was due to the obscuration of the glass by the smoke. The other light, although white, was dim. Neither light was electric but only kerosene lamps although said to be regulation ships' lights.

I find from the evidence that the lights on the Destroyer were inadequate and insufficient at the time of the collision. I also find that it was imprudent not to provide a crew on the Destroyer to attend to the lights and to see that they were kept brightly burning, and to have equipment for the sounding of fog signals to indicate the presence of the Destroyer in this unusually long flotilla. The above named witness Cullison, called by the libelant, who was familiar with the towing of destroyers for similar voyages, testified that in his opinion the failure to provide a crew on the Destroyer was not prudent. I also find that these faults contributed to the collision. It will be remembered that the stem of the Winding Gulf struck the Destroyer on the starboard side well aft. It is thus apparent that the collision occurred only by a very narrow margin of time and could have been avoided by a slight sheer to port by the Winding Gulf, if the lights on the Destroyer had been sufficiently bright to have been seen by the lookout on the bow of the Winding Gulf shortly before he first discerned the hulk of the Destroyer dead ahead. While there is some uncertainty as to the density of the fog at the precise time, it seems highly probable that if the lights on the Destroyer had been reasonably adequate they could and would have been seen by the lookout before he observed the hulk of the vessel.

[fol. 43] It is contended by counsel for the Boston Company that these facts are immaterial in this case because the Destroyer was an inert tow wholly under the charge

of the tug and therefore the tow was not itself responsible to the Winding Gulf. Robinson on Admiralty, pp. 679-683; Sturgis v. Boyer, 24 How. 110. And it is further argued that if there were faults with respect to the lights and absence of crew on the Destroyer, the complaint of the Winding Gulf with respect thereto can be properly asserted only in the libel against the tug, or its owners, now pending in the Southern District of New York. But after much consideration I have reached the conclusion that in view of the contract between the Boston Company and the Foundation Maritime, Ltd., above referred to, these faults with respect to lights and absence of crew must be attributed directly to the owner of the Destroyer. The contract provided (1) that the Towing Company agreed to provide only motive power; (2) that the "two vessels will be taken as a double tow, that is, two vessels in tow of the one tug"; (3) that in the towage service the master and crew of the tugs used "become the servants of and identified with such vessel and craft or their owners"; and (4) that the Tug Company would not be responsible for the acts or defaults of the master or crew of the tug, nor for any damage from whatsoever cause arising that may occur either to the vessels towed or to any other ship, vessel or property of any kind. And the Towing Company was to be held harmless and indemnified by Boston Company against all such damages. It is also fairly inferable from the contract as a whole that the towage of these two old and obsolete destroyers as a double tow for the long voyage from Sydney, Nova Scotia, to Baltimore, Maryland, through the two Canals, was regarded as particularly hazardous, and that the Boston Company, having purchased the destroyers for scrapping, was desirous of having them delivered in Baltimore at minimum expense of transportation, and taking all the risks of the voyage.

[fol. 44] When the contract was first offered in evidence at the trial of the case, I had the view that, being a contract between parties other than the owners of the Winding Gulf, it was probably material only for its indication that the particular towage contract was a hazardous one; but later, after inviting and receiving argument on the point from counsel for the parties, I have concluded that the provisions and subject matter of the towage contract legally result in mak-

ing the faults with respect to the lights and absence of crew on the Destroyer directly attributable to the owner of the tow, and that these faults may be ascertained in this case without the circuity of action due to their first being litigated in a suit by the Winding Gulf against the tug or its owners. I assume, of course, that any question of indemnity arising under the contract could not be litigated here in this case; but nevertheless the absence of adequate lights and crew upon the Destroyer constituted defaults by the master of the tug who, by the terms of the contract, became in this respect the servant of the Boston Company. Where injury to third persons results from the faults of the tow itself the latter is directly liable to the third person. Robinson, pp. 679, 680; Sturgis v. Boyer, 24 How. 110, 122; and see The Eugene F. Moran, 212 U. S. 466, where a tow was held liable for the absence of required lights.

The validity of a provision in a towage contract making the master or crew of the tug the servant of the owners of the tow has heretofore been the subject of much diverse judicial consideration. See Robinson on Admiralty, pp. 670-673. But this has now finally resulted in the establishment of the validity of such a contract. Sun Oil Co. v. Dalzell Towing Co., 287 U. S. 291 (1932); The Primrose, 3 F. S. 267; The H. C. Jefferson, 69 F. S. 650. The prevailing underlying principle is based on the proposition that a tug is not a common carrier and therefore the Towing Company may stipulate against its own negligence or default. [fol. 45] My conclusion as to the ultimate facts, therefore, is (1) that the Winding Gulf was at fault in navigation in not changing her course or speed; (2) that the owner of the Destroyer was at fault with respect to lights and absence of crew; (3) that the faults of both contributed to the collision and damage and (4) therefore an interlocutory decree must be passed in accordance with the usual maritime rule for a division of the damages. Counsel may submit the appropriate decree in due course.

W. Calvin Chesnut, U. S. District Judge.

[fol. 46] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

[Title omitted]

INTERLOCUTORY DECREE—Filed September 5, 1947

The above-entitled cause having come on for trial and having been heard on the pleadings and proofs of the respective parties and having been argued and submitted by the advocates for the respective parties and due deliberation having been had thereon, and the Court having rendered its decision in writing, holding both the "Winding Gulf" and Boston Metals Company, as owner of the I-24, at fault and directing a decree accordingly,

Now on motion of John H. Skeen and Frank, Skeen and Oppenheimer, Proctors for Libelant, it is

Ordered that the Opinion of the Court heretofore filed herein on the 10th day of June, 1947, be and it is hereby adopted as the Court's findings of fact and conclusions of law pursuant to Supreme Court Rule 46½; and it is further

[fols. 47-77] Ordered, Adjudged and Decreed that Libelant, Boston Iron and Metal Company, as owner of the Destroyer, I-24, recover of and from SS "Winding Gulf", her engines, etc., and the Massachusetts Trustees of Eastern Gas and Fuel Associates, claimants and respondents, one-half of the damages suffered by Libelant arising out of the matters set forth in the Libel herein; and said Massachusetts Trustees of Eastern Gas and Fuel Associates, owners of SS "Winding Gulf", having filed herein their cross-libel against Boston Metals Company, formerly Boston Iron & Metal Company, cross-respondent, it is further

Ordered Adjudged and Decreed that Massachusetts Trustees of Eastern Gas and Fuel Associates, as owners of the SS "Winding Gulf", cross-libelants, recover of and from Boston Metals Company, cross-respondent, one-half of the damages suffered by them arising out of the matters set forth in the cross-libel and it is further

Ordered, Adjudged and Decreed that Libelant, Boston Metals Company, and cross-libelants, Massachusetts Trustees of Eastern Gas and Fuel Associates, each recover one-half of their respective costs from the other.

W. Calvin Chesnut, United States District Judge.

Approved as to Form: John H. Skeen, Frank Skeen & Oppenheimer, Proctors for Boston Metals Company, Libelant and Cross Respondent; Bingham, Dana & Gould, Niles, Barton, Morrow & Yost, Proctors for Massachusetts Trustees of Eastern Gas & Fuel Associates, Cross Libelants and Claimants.

Dated: 9/5/47.

[fol. 78] IN UNITED STATES DISTRICT COURT

TRANSCRIPT OF PROCEEDINGS, BALTIMORE, MD.

MORRIS SCHAPIRO.

* * * * * * *

Q. What is your occupation, Mr. Schapiro?

A. I am President of the Boston Metals Company.

Q. At the time of this accident in July, 1945, the name of the company was Boston Iron and Metal Company?

A. That is right.

* * * * * * *

[fol. 79] Q. Mr. Schapiro, do you yourself have any knowledge of this purchase by your company of these destroyers?

A. Yes, sir.

Q. How many destroyers did your company purchase from the Canadian Government?

A. Six.

Q. And five of them arrived at Baltimore?

A. Yes, sir.

* * * * * * *

[fol. 80] Q. It is stated in the trial memorandum which Mr. Skeen has submitted for the Boston Metals Company that the Foundation Maritime, a coastwise towing organization of Canada, towed these vessels from Sydney to the Cape Cod Canal. Did you enter into any arrangement with the Foundation Maritime regarding that towage?

A. We did.

Q. Who negotiated the arrangements with the Foundation Maritime for towing these destroyers?

Mr. Skeen: That is objected to.

The Court: I do not see the relevance of it, but I do not see that it will do you any harm. I do not know how to rule on it, whether it might or might not be important in the case.

Mr. Skeen: I think it is entirely irrelevant.

The Court: What is the question?

(The pending question was read by the Reporter.)

The Court: Oh, well, I will let Mr. Schapiro answer it. It might possibly have some bearing on the case.

The Witness: I did.

By Mr. Bolster:

Q. Was an agreement entered into between the Boston [fol. 81] Metals Company and Foundation Maritime relative to this towage?

Mr. Skeen: I object to that.

The Court: Overruled.

The Witness: There was.

By Mr. Bolster:

Q. Have you a copy of that agreement here in Court?

A. No. I have not.

Mr. Bolster: Have you a copy, Mr. Skeen?

Mr. Skeen: I have.

* * * * * * *

[fol. 82] The Court: Do you want him to identify this contract you have in your folder?

Mr. Skeen: Subject to the objection.

[fols. 83-162] The Court: Let him identify it. Just fold the paper temporarily. If you know this, you may speak, and say you will produce it at the proper time.

Mr. Skeen: Well, he is here, and the contract is here.

Mr. Bolster: Perhaps we might have the contract marked, Your Honor, Schapiro Exhibit 1 for identification, and then it can be held in that fashion.

The Court: That is what I am suggesting.

Mr. Skeen: All I am doing with this, under the instruction of the Court, and over objection, is to show this to Mr. Schapiro and ask him "Is this the contract?".

The Court: All right.

(Thereupon, Mr. Skeen exhibited the contract in question to the witness.)

The Witness: Yes, sir. That is the contract. It is a regular printed form of contract that was signed up and accepted—not for this particular tow, but we have a regular printed form for a contract.

Mr. Skeen: Mr. Bolster wants that marked Schapiro Exhibit No. 1 for identification.

The Court: All right. You may hold it if you want it.

(The contract in question was marked Schapiro Exhibit No. 1 for identification.)

* * * * * * *

[fol. 163] CAPTAIN PAUL F. CULLISON

The Clerk: Your name, please?

The Witness: Paul F. Cullison.

Direct examination.

By Mr. Skeen:

Q. Captain, what is your occupation?

A. I am a tugboat master.

Q. And how long have you followed that occupation?

A. I have been licensed since 1904.

* * * * * * *

[fol. 164] Q. And have you been continuously engaged as a tugboat captain practically your whole life?

A. Practically the whole time. Yes, sir.

* * * * * * *

[fols. 165-169] Q. How many destroyers have you towed, in your experience?

A. Oh, I think I have towed about thirty.

* * * * * * *

[fol. 170] By the Court:

Q. Well, have you personally towed any of these thirty destroyers under anything like similar circumstances?

A. Yes, sir.

* * * * * * *

Q. What destroyers were they, not necessarily the names?

A. They were the same type of destroyers, about 310 feet long by 32 foot beam, drawing ten feet aft and about six or seven forward.

* * * * * * *

[fols. 171-180] Q. You have on occasion towed two?

A. Yes, sir.

Q. Arranged in tandem this way?

A. Yes, sir; two of them.

Q. How long were the voyages on which you towed them?

A. Well, from Narragansett Bay to Baltimore, we would come down usually through the Chesapeake and Delaware Canal—made a voyage of about 500 miles,—pretty close to it.

* * * * * * *

[fols. 181-184] Q. Did those destroyers that you took down from Prudence Island have any crews?

A. Yes, sir.

Q. And what did they have aboard in the way of crews?

A. We had two men on each.

Q. Did they have any power at all?

A. No power whatever.

* * * * * * *

[fol. 185] Q. What was the function of the two men on each of those two destroyers that you brought down, Captain?

A. Well, we had them on there to keep the boats lighted up.

* * * * * * *

Q. It was part of their duty to see that proper lights were set and burning on the destroyers?

A. That is right, sir.

Q. And if the lights became dim, it would be their duty to clean them, would it?

A. Yes, sir.

Q. And trim them, see that they were kept full of oil, [fol. 186] and properly burning during the night hours?

A. Yes, sir.

* * * * * * *

Q. Captain, in your judgment would it be a prudent thing for you to undertake to tow those two destroyers from Narragansett Bay to Baltimore without any men on the destroyers?

Mr. Skeen: That is objected to.

The Court: Overruled. You may answer, Captain.

[fols. 187-354] The Witness: Well, in my judgment, it wasn't.

* * * * * * *

[fol. 355] PROCEEDINGS

The Court: Gentlemen, we will resume the case on trial. I believe there was an offer of evidence during the trial, on Monday, with regard to some contract between the Libellant and the towing company. I do not know that that question was disposed of.

Mr. Bolster: Your Honor, the way I understood it would be disposed of was this: I was about to offer it in evidence, and Mr. Skeen objected, and Your Honor excluded it. I then made an offer of proof as to what I thought the contract contained.

If Your Honor is disposed to change your mind on that point, I should like to offer it again, but if Your Honor is still of the opinion that it is not to be admitted, of course I shall not do so.

The Court: I do not understand that I made any final ruling with regard to its admissibility. I did not think it was admissible at that particular time, on cross examination, I think, because it occurred to me possibly there might be affirmative evidence from the Respondents. I did not look at the paper, and formed no opinion at that time as to

whether it was really relevant at a proper time in the proceeding.

* * * * * * *

[fols. 356-377] Mr. Bolster: I should like to offer it, Your Honor.

* * * * * * *

[fols. 378-460] The Court: I will admit the paper for whatever proper legal bearing it has on the issues in the case. I think it may have some. I am not clear that it has as much as contended for by counsel for the Respondents.

Mr. Skeen: This is a matter of some importance, perhaps more than appears. I understand that Your Honor admits it, and Your Honor notes that I object to it.

The Court: Yes, I noted your objection to it, and I overrule your objection and give you an exception. I have stated the limitations, probably, as to the effect of it on the liability in the case.

* * * * * * *

[fol. 461] Mr. Skeen: When you come to deal with the cross libel, in this respect it is different, you have to consider whether there is any affirmative proof, because there they undoubtedly do assume the burden of proving some fault on the part of the owner of the destroyer, or some fault on the part of the destroyer for which the owner is responsible. And in determining that, you would look to the evidence you have heard in this case, and decide whether there has been any such proof.

But, now, that is not the whole story, because, suppose they do satisfy you that in some respect the destroyer, not the owner, but the destroyer, is at fault. Suppose that—well, I can hardly imagine how it could be—but, if such a situation did arise, then the decree could not, in my judgment, go against the owner, for this reason, that the whole charge of this destroyer was put in the hands of the tug, and anything wrong that the destroyer did—and I say I cannot imagine what they did—but anything wrong the destroyer did would be the fault of the tug.

[fols. 462-505] The tug furnished the hawsers. The tug

put the lights on board, and lighted them. The tug took the tow, knowing that there was no crew on board, and that the destroyer was a dead ship. So that there isn't anything that I can imagine as a fault on the part of the destroyer that would not also be a fault on the part of the tug.

The reason I say I do not think you could make a decree against the owner of the destroyer on the basis of some fault on the part of the destroyer, would be because any fault that you found to be attributable to the destroyer would be the fault of the tug and not the owner of the destroyer. All the owner of the destroyer did was to engage the tugboat to bring the destroyer down there, on terms that were perfectly well understood on both sides. I am not talking about the contract. I do not think the contract ought to be in this case.

* * * * * * *

[fol. 506] In United States District Court

Libellant's (Schapiro) Ex. 1—For Identification

Foundation Maritime Limited
135-137 Lower Water Street
Halifax, N. S.

Salvage—Towing
Marine Construction

July 3rd, 1945.

Halifax Station, Telegraphic Address, "Foundation—Halifax", Wireless via Camperdown. Telephones: Day 3-7381, Night 3-7384.

Montreal Office, Telegraphic Address, "Foundation—Montreal", Code A, B, C, 6th Edition. Telephone Fitzroy 4671, day and night service.

Boston Iron & Metal Company, 313 East Baltimore St., Baltimore 2, Md.

Dear Sirs:

We confirm our telegram to you of yesterday and your reply wherein it is agreed that we will supply tug for the

towage of two former Canadian Navy Destroyers ("St. Francis" and "Hamilton") from Sydney, N. S. to Baltimore, Md. for the sum of Eleven Thousand Dollars ($11,000.00) U. S. Funds.

It is understood that these vessels are now ready at Sydney and that you have arranged to have them placed in seaworthy condition with all watertight doors closed and rudders secured amidships.

It is further understood that these two vessels will be taken as a double tow, that is the two vessels in tow of the one tug. It is further understood and agreed that our services will be supplied in accordance with the Standard Towing Conditions attached hereto and forming part hereof.

In the event that either of the vessels is lost enroute we shall be entitled to payment in respect of each said lost vessel the proportion of Five Thousand Five Hundred Dollars ($5,500.00) U. S., which the distance towed from Sydney to the point of loss bears to the total distance from Sydney, N. S. to Baltimore and in addition, the sum of Five Thousand Five Hundred Dollars ($5,500.00) U. S. in respect of each vessel delivered at Baltimore.

[fol. 507] We shall also be entitled to engage an American towing company to supply tug service for part of the voyage in American waters and the services of any tug so supplied shall be considered as supplied under the above mentioned terms and conditions. We or our sub-contractors will supply the necessary personnel for handling the vessels through the Cape Cod Canal.

You undertake to make payment of the above towage money immediately upon completion of the services.

Your acceptance of this letter will constitute a contract between us.

Yours very truly, Foundation Maritime Limited, E. M. Woollcombe, General Manager.

EMW/M

Accepted:

[fols. 508-510] STANDARD TOWING CONDITIONS

As Agreed Between the Shipping Federation of Canada and Eastern Canadian Tug-Boat Owners Association.

1. The Tug Company will not be responsible for any delay in supplying tug service arising from any cause whatsoever or for any loss, damages, or injuries which may be sustained in consequence thereof by the owners, charterers or operators of any vessel or craft or by any other person or persons interested therein.

2. Tug services will be supplied upon the condition that all towing, moving, shifting, docking, undocking, or other handling of a vessel or craft of any character by a tug or tugs owned or employed by the Tug Company is done at the sole risk of such vessel or craft and of the owners, charterers or operators thereof, and that the Master and crew of such tug or tugs used in the said services become the servants of and identified with such vessel or craft and their owners, and that the Tug Company only undertakes to provide motive power.

3. The Tug Company will not be responsible for the acts or defaults of the Master, or crew of such tug or tugs, or any of their servants or agents or else whosoever, nor for any damages, injuries, losses or delays from whatsoever cause arising that may occur either to such vessel or craft, or property or persons on board thereof, or to any other ship or vessel or property of any kind whether fixed or movable and the Company shall be held harmless and indemnified by the Hirer against all such damages, injuries, losses and delays, and against all claims in respect thereof.

4. Such exemption from liability shall apply regardless of whether such vessel or craft assists in the services with its own steam or power or in any other way, and irrespective of whether any employee of the Tug Company or the Master, or any of the crew of such tug or tugs is at the time of said services on board of such vessel or craft, or in command thereof.

5. The foregoing conditions shall apply to any damages, injuries or loss from whatsoever cause arising that may occur to the vessel or craft requiring the tug or tugs or to any other vessel or craft, or to any person or property on board

thereof, or to any other property whether fixed or movable, while such tug or tugs is or are in attendance upon or fast to or engaged in any manoeuvre for the purpose of making fast to, or disengaging from or proceeding clear from the vessel or craft requiring the tug or tugs, provided however that the said conditions shall not apply to loss or damage to the tug or tugs or to property on board the tug or tugs or to damages for personal injuries to or loss of life of members of the crews of the tug or tugs or persons on board thereof, unless such loss or damage or such damages for personal injuries or loss of life shall have been caused or contributed to by the fault or negligence of the vessel or craft requiring the tug or tugs.

* * * * * * *

[fol. 511] IN UNITED STATES DISTRICT COURT

LIBELLANT'S EXHIBIT NO. 2

ROYDEN WILBOUR DYKEMAN

Q. Are you a Master Mariner?
A. Yes.

* * * * * * *

Q. And how long have you been going to sea?
A. Since 1915.

* * * * * * *

[fol. 512] Q. And have you been employed by the Foundation Maritime Limited of Halifax for some time?
A. Since they came here approximately.
Q. When was that?
A. 1934.
Q. Have you been in command of tugboats or salvage vessels during that time?
A. Yes.
Q. Continuously?
A. Yes.

Q. In the year 1945, of what vessel were you the Master?
A. The "Foundation Security."
Q. What kind of a vessel was that?
A. She was—you would call her an ocean-going steam tug.
Q. And in what business was she employed?
A. Towing and salvage operations.
Q. For?
A. Foundation Maritime.

* * * * * * *

[fol. 513] Q. What was your practice, Captain, with respect to keeping a log book on the "Foundation Security"?
A. For every movement, entry is made in the log book.

* * * * * * *

Q. Were abstracts of the log book furnished to your office at Halifax?
A. Yes, at the end of every job or weekly; when we were on a station anywhere standing by, it is weekly and otherwise it is at the end of every job, abstracts were sent to office at Halifax.

* * * * * * *

[fol. 514] Q. And who was the officer of the company who had the custody of these abstracts of the log?
A. Mr. Turner.
Q. What is Mr. Turner's position with the Company?
A. He is office manager and accountant.

* * * * * * *

Q. Now, coming back, Captain, to July 1945, do you recall going to Sydney early in July—the latter part of June or [fol. 515] early in July?
A. Yes.
Q. You were Master of the —?
A. "Foundation Security."

* * * * * * *

Q. When you got to Sydney, what did you find you had to tow?

A. Two destroyers to Sandwich, Cape Cod Canal on this end.

• • • • • • •

[fol. 516] Q. I think you said, Captain, that those two destroyers were anchored in the harbour at Sydney?

A. They were at Navy mooring buoys—not their own anchors.

• • • • • • •

Q. Will you look at the page, for the purpose of refreshing your memory, and say when you — on board the "Foundation Security" arrived at Sydney bar?

A. 5:10 a.m. July 3rd.

Q. 19—?

A. 45.

Q. 1945. Speaking then, without refreshing your memory, will you say what you did after you arrived? Did you an-
[fol. 517] chor in the stream or tie up alongside?

A. Tied alongside.

Q. You tied alongside the two destroyers?

A. That is right.

Q. The destroyers, you said, were at that Navy moorings?

A. That is right.

Q. Any crew on board the destroyers?

A. No, there were watchmen there. They watched several destroyers about. There were some Navy personnel around there at the time giving us delivery of them.

Q. What did you do as far as the destroyers—did you put any equipment on board or anything of that kind?

A. The first thing we put our bawsers and bridles here between the two destroyers that they were being towed by.

Q. By the way, was it your intention to tow the destroyers in tandem?

A. Yes.

Q. That means?

A. One ahead of the other.

Q. That means one ahead of the other?

A. Yes. And the crew, under the supervision of the mate and myself, closed all the ports.

Q. Perhaps, before we get to that, will you just say what equipment you put on board the vessels—towing equipment, I mean?

A. We put this 12-inch hawser.

* * * * * * * *

Q. As a matter of fact, were there any towing hawsers on the destroyers?

A. No.

[fol. 518] Q. I see. Now, what other equipment? You mentioned something about bridles?

A. 1½-inch bridles on either end of the manila rope and cringlers on either end of the manila hawser and shackling. inch and a half wire pennants. They were approximately 120 feet long—the pennants or bridles, whatever you call them.

Q. Was this equipment put on board on the 3rd of July?

A. Yes.

* * * * * * * *

Q. On July 4th, after refreshing your memory, can you say what you did?

A. Yes, July 4th was when we got the destroyers ready for sea.

* * * * * * * *

Q. You stated July 3rd you arrived there and put the [fol. 519] equipment on board?

A. Yes, we were detained for crew on this trip, and I see now it was on July 6th.

Q. Did you do something on July 6th with respect to the destroyers?

A. Yes, the crew which consisted of two mates—

Q. That is your crew?

A. Yes, and four sailors.

Q. Two mates and four sailors?

A. Yes, closed all ports.

Q. Ports of what?

A. Port holes.

Q. Of the destroyers?

A. Yes.

Q. What else did you do?

A. Excuse me, that is six sailors, not four. And we closed all the hatches or any entrance which would lead to the holds of the ships. We closed all the doors and secured them to keep them from banging. That is about all.

Q. What about the rudders?

A. Oh yes, the rudders, which were hard over, we jacked amidship and secured them.

Q. How did you secure the rudders?

A. This was hand gear down there. We stayed it with ropes, you know, so it wouldn't move.

* * * * * * *

[fol. 520] Q. What doors did you close?

A. We closed all doors.

Q. You closed all doors, and how did you make them secure?

A. Some of them had a safety lock on them—a kind of a lever—and some of them just an ordinary door lock.

Q. Now, there are port holes shown on that photograph on the bridge?

A. None of those were open.

Q. Were any of those port holes open?

A. No, they wasn't open.

Q. What about the port holes on the sides of the vessels? What was done with them?

A. There was dozens of those open. We closed each one and made sure they were secure.

Q. How do you make them secure?

A. You shut the port and there is a bolt comes down and fits on the side of the port and there is a nut screws tight and there is a gasket around the port.

Q. Who supervised that job?

A. Myself.

Q. Did you inspect the work that was done?

A. Oh yes.

Q. On both destroyers?

A. Yes, we got one ready at a time, you see.

* * * * * * *

Q. Do you recall [illegible] he two destroyers had similar hatches and if they were closed?

A. Yes, they were the same and they was all closed.

* * * * * * *

[fol. 521] Q. Now, Captain, did you do any pumping?

A. No, no pumping.

Q. Did you inspect the destroyers for the purpose of seeing whether or not any pumping was necessary?

A. Yes, we looked in the engine room—that was the lowest part of them—and there was a little water in all of them there that was laying at the buoys in Sydney, and the watchman said they wasn't leaking. If they were making any water, they would have had to pump them there at the time they layed there.

Q. Did you satisfy yourself that the two destroyers were [fols. 522-524] in fit condition to tow before the towing commenced?

A. Yes, I satisfied myself that they were as good as could be made.

Mr. Edgerton:

I move that be stricken from the record as not responsive.

By Mr. Smith:

Q. My question was, Captain: Did you satisfy yourself that the vessels were in a fit condition to be towed?

A. Yes.

* * * * * * *

Q. Do you recall how long this work, which you have mentioned to us on July 6th—how many hours the two vessels took?

A. Five hours we was getting ready for sea.

* * * * * * *

Q. Now, you haven't mentioned the names of these destroyers. You had towed some other destroyers before these two?

A. We had six of them.

Q. But do you recall the names of these two destroyers that you were towing on the day in question?

A. "St. Francis" and "Hamilton." There was no names on them, but that is what they told us the names were.

Q. But you had numbers on them?

A. Numbers on them.

Q. I suppose you don't remember now which was ahead and which was behind?

A. No, I didn't bother my head about them. I had enough else to worry about.

* * * * * * *

[fol. 525] Q. How did they tow?

A. The first ones towed straight and the hind ones sometimes would sheer, according to the wind.

* * * * * * *

Q. Look at the abstract of log just for the purpose of saying when you arrived at Cape Cod? 3 p. m., is that it?

A. 3 p.m. July 12th arrived outside Cape Cod Canal buoy. Started taking in hawser. Made one destroyer fast alongside.

Q. Yes?

A. Started to get second hawser. Wind breezing up southwest strong. Had to let both destroyers trail astern again. This is what was going on while we were waiting for the "Peter Moran."

Q. When did the tug "Peter Moran" arrive?

A. 9:15 p.m.

Q. On what day?

A. July 12th.

Q. And did the "Moran" take way?

A. He took one destroyer and he said he would be back at 4 o'clock on the 12th a.m.

Q. When did he take the destroyer away? Did you see him take the destroyer away?

A. Yes.

Q. Before you left on your return to Halifax, had the destroyers been taken away?

[fols. 526-527] A. One. He took one, and I put the other

one in the canal. He took one and made fast on the other side of the canal, and I took one in to Sandwich and tied her up at the Dolphin and came to Halifax.

* * * * * * *

Q. What became of the equipment that you had used—your towing equipment—that you had used on the tow down?

A. We had all aboard of the "Foundation Security."

* * * * * * *

Q. And the "Moran" must have used her own gear?

A. Oh yes.

* * * * * * *

[fol. 528] Q. Now, Captain, you have mentioned that you also towed some other destroyers previously?

A. Yes.

Q. How many destroyers had you towed?

A. Four besides the "St. Francis" and "Hamilton."

Q. And were the destroyers towed in tandem?

A. The same way, yes.

Q. Were they the same kind of destroyers?

A. Yes.

* * * * * * *

Q. Where was the first tow that you made of the first two tugs in tandem—where was that from?

A. From Pictou, Nova Scotia.

Q. To where?

A. Sandwich.

Q. On that tow—the tow from Pictou—were the destroyers without crews and was the towing conducted in the same manner as you have described the towing of these two vessels from Sydney?

A. That is right, no crew on any of the tows.

* * * * * * *

Q. On that tow, did anything happen out of the ordinary?

* * * * * * *

[fols. 529-530] A. Yes, we lost a stern destroyer on that trip.

* * * * * * *

[fol. 531] Q. Captain, can you tell us what the "Security" was doing between your arrival at Sydney bar at 5:10 a. m. on July 3rd and your leaving at 12:15 p. m. on the 6th, I think?

A. Mostly we was hung up for crew.

Q. Did you do any work on the destroyers between that time?

A. We got them ready to proceed the day we left.

* * * * * * *

[fol. 532] Q. Do you know how much they were drawing?

A. No, I do not.

Q. Have you any notion?

A. No.

* * * * * * *

Q. When you left these moorings that you speak of, how were the mooring cast loose or got rid of?

A. There was wires. They was hauled aboard of the destroyers.

Q. By whom?

A. Our crew.

[fol. 533] Q. That is, some of your deck hands were aboard the destroyers?

A. Yes, getting under way.

Q. And they hauled in the wires with which the destroyers had been moored, is that correct?

A. Yes.

* * * * * * *

[fols. 534-535] Q. You said that the after destroyer would sheer one way or the other, depending on the wind?

A. Yes.

* * * * * * *

[fol. 536] Q When you left Sydney, do you know whether there was any equipment on board these vessels for sounding fog signals?

A. No, there was nobody to sound them.

Q. There was no one to use anything, anyway?

A. No, they were dead.

Q. But do you know whether there were any mechanical fog horns on there?

A. I don't know.

• • • • • • •

Q. What was on them by way of lights when you left Sydney?

A. There was quite a few spare lights around in the lamp lockers. We used our own.

Q. You used your own?

A. Yes.

Q. What did you use, oil lighters?

A. Yes.

Q. What type of lights?

A. I don't know what you would call them you use all around the horizon—white lights.

• • • • • • •

[fol. 537] Q. And you put this I call type of all around white light all around the destroyer when you left Sydney?

A. Yes.

Q. And did you light them at that time?

A. Yes.

Q. They burned constantly, did they?

A. No, some trips there would be one burned out.

Q. I am referring to this particular trip?

A. I couldn't say that.

Q. Did any of your crew board the destroyers from the time you left Sydney on that trip until you got to the Canal?

A. No.

• • • • • • •

Q. Are you familiar with Article 5 of the International Rules for Preventing Collisions?

A. Yes.

Q. And can you tell us what they require for lights on towed vessel?

A. The same as a steam vessel under way, with the exception of the white light, which she shall never carry.

Q. So that the white lights, which were actually carried, were not in compliance with the rules for towed vessels, were they?

A. That is right.

Q. Did you take those lanterns off when you left the vessels in the Canal?

A. Yes.

* * * * * * *

[fols. 538-539] Q. In your Direct Testimony, you mentioned the fact that the towing gear that the "Peter Moran" used was a lot lighter than yours?

A. Right.

Q. She was a smaller tug; she used a small hawser, didn't she?

A. Yes.

* * * * * * *

[fol. 540] Q. Are you familiar with the arrangement under which those vessels were towed?

[fols. 541-542] A. No.

Q. Do you know anything about that at all?

A. No.

Q. Do you know what arrangement, if any, was made between your employer and the "Moran" people about splitting up the towing?

A. Now, there was an arrangement made, but I couldn't say what they were.

Q. You don't know that?

A. No.

* * * * * * *

[fols. 543-549] Q. You didn't leave any gear at all for the "Moran"?

A. Just the mooring line that was aboard them for the canal.

Q. There were no other lanyards, lanterns or lights, were there?

A. There were lanterns aboard of her. I didn't know what they were; I didn't pay any attention.

• • • • • • •

[fol. 550] IN UNITED STATES DISTRICT COURT

LIBELLANT'S EXHIBIT 3

IRA F. GEORGE, JR.,

[fol. 551] Q. In July of 1945 what was your occupation?

A. I was Master of the Peter Moran.

• • • • • • •

[fol. 552] Q. And by whom are you now employed?

A. Moran Towing & Transportation.

Q. And have you been continuously employed by them, and if so, for how long?

A. About three years and a half.

Q. How long did you serve as the Master of the Peter Moran?

A. I was Master I think it was 1944 I went there; about a year and a half I believe with the Peter Moran.

• • • • • • •

Q. Captain, I direct your attention now to the beginning of the voyage on which this accident occurred and ask [fol. 553] you when and where you picked up a tow which you took on this voyage?

A. We picked this tow up in Cape Cod Bay, on the east end of Cape Cod Canal. We brought the tow through the canal ourselves.

Q. And what did the tow consist of?

A. Two destroyers.

• • • • • • •

[fol. 554] Q. In connection with the making up the tow did you yourself go on board the I-24?

A. Yes, I was aboard both destroyers coming through the canal.

Q. Did you make any examination of them as to their condition for towing?

A. Yes. They were in good shape and seaworthy condition.

Mr. Edgerton: I object to that and move that it be stricken.

Q. Did you look into the hold of the I-24 to see whether she was leaking or not?

Mr. Edgerton: I object as calling for a conclusion.

A. I was below in the I-24 and the other one too, and I didn't see any water or evidence of leaks.

Q. And what was your opinion as to the condition of the I-24 with respect to the voyage you were about to take?

Mr. Edgerton: I object to the question.

A. For the voyage we were going to take they were in seaworthy condition.

Mr. Edgerton: I move to strike out the answer until it [fols. 555-556] appears what voyage they were going to take them on.

Q. What was the voyage, Captain?

A. From Cape Cod Canal to Baltimore, Maryland.

• • • • • • •

Q. What length of hawsers were you using?

A. A tug's hawser for 250 fathom, and the intermediate hawser for 200 fathom.

• • • • • • •

[fols. 557-558] Q. Did you personally supervise the rigging of these hawsers in the arrangement that you described?

A. Yes, sir.

• • • • • • •

[fol. 559] Q. Who furnished these hawsers?

A. The tug.

Q. The Peter Moran?

A. Yes, that is right.

[fols. 560-565] Q. What was done upon leaving the west end of the canal with respect to placing lights on the destroyers?

A. The lights were lit and put up when we got under way with the tow at the west end of the canal, and put on the hawsers.

Q. What lights were placed on the first destroyer?

A. We had one white light.

Q. And where was that light placed?

A. On the yardarm of the mast.

* * * * * * *

Q. What lights were placed on the I-24?

A. We had two white lights, one on each side of the yardarm.

Q. Were those lights placed under your supervision?

A. Yes, sir.

* * * * * * *

[fol. 566] Q. What lights was the tug displaying?

A. Regulation towing lights.

* * * * * * *

A. (Continuing) Red and green.

Q. Describe the regulation towing lights.

A. Red and green lights. And three towing lights on the forward mast.

[fols. 567-579] Q. What kind of lights are they? I mean oil or electric?

A. Electric lights.

* * * * * * *

Q. Was the tug displaying any other lights than the ones you have described?

A. We had two red lights.

Q. Where were they displayed?

A. They were displayed—they were hung between the foremast and the stack; they have a stay there.

* * * * * * *

[fols. 580-583] Q. How many did you have all together in your crew?

A. We carried fifteen.

* * * * * * *

[fol. 584] Q. Where did you have the one you had? Alongside?

A. We had him alongside, and then we hooked him back of the hawsers and connected him up.

Q. Who rigged the intermediate hawser?

A. The tug's crew.

Q. Your deckhands and mates?

A. Yes.

Q. Did your deckhands and mates also rig the hawser between the Peter Moran and the I-93?

A. Yes.

Q. There were no crews on either of these destroyers?

A. No.

Q. There was no steam either?

[fol. 585] A. No.

* * * * * * *

Q. Where was the I-24, Captain, when you were aboard her?

A. I was aboard her when we was coming through the canal.

Q. And at that time you were towing her alongside?

A. Alongside.

* * * * * * *

[fol. 586] Q. The Peter Moran supplied both the towing hawser and the intermediate hawser, didn't she?

A. That is right.

Q. And she supplied the pennants that were used there?

A. Yes.

Q. Did the boats have anything further on them in the way of lights or gear of that sort?

A. Well, they had some old lights and duffle around.

• • • • • • •

Q. Did you go through the pilot houses and bridge deck space on the boats?

A. Yes.

Q. What did you find there in the way of gear?

[fols. 587-589] A. Very little. She had been stripped pretty well.

Q. Did they have any lights, that is, lanterns?

A. They had some old lanterns, but I think we used some of ours.

Q. Do you know whether or not the lanterns they had were oil or electric?

A. They were oil.

Q. And they had no electric power?

A. No electric power.

Q. The lights that you actually used were those supplied by the Peter Moran, is that correct?

A. I believe some were supplied by the Peter Moran and some was from the destroyers.

Q. Can you tell me which lights were supplied by the destroyers?

A. No, sir.

Q. Have you any recollection about that at the present time?

A. No, sir.

Q. So that when you say that you think some were supplied by the Peter Moran and some by the destroyers; is that just guessing on your part?

A. Well, yes, more or less, I guess.

• • • • • • •

[fols. 590-598] Q. Did you know anything, Captain, about the arrangement between the Peter Moran and these destroyers, or their owners or agents at the time?

Mr. Skeen: That is objected to.

A. No, I do not know of anything.

Q. You do not know anything about that at all, is that right?

A. No, sir, I do not.

Mr. Skeen: Strike out the objection.

Q. Did you start right out from Wing's Neck on your long hawsers?

A. Yes.

Q. There was no other way you could do it?

A. No other way.

Q. There was nobody aboard to handle any lines?

A. That is right.

* * * * * * *

[fol. 599] Q. You knew, Captain, when you left Wing's Neck, that there was no way of any fog signals being sounded on these destroyers?

A. Yes, that is right.

Q. And you knew also going outside of Block Island and Montauk that you were going to cross the traffic lanes through the Long Island Sound and Block Island Sound, didn't you?

A. Yes.

Q. And you put up these two red lights because you knew you were going to be a menace to traffic coming through there?

Mr. Skeen: That is objected to as to form and leading.

[fol. 600] A. Well, not exactly a menace, but well, as a warning to keep away.

Q. You knew you had a long tow?

A. Yes.

Q. About a half a mile?

A. Yes.

Q. An unwieldy tow?

Mr. Skeen: Objected to.

A. Not exactly.

Q. You knew the vessels couldn't be steered?

A. Yes.

Q. And you knew they might sheer one way or the other?
A. That is right.
Q. And you knew if you made a sharp change of course they would go ahead on their old course before they felt the strength of the hawser?
A. Yes.
Q. And that would be more so of the tail boat than the head boat with nothing behind her?
A. Yes.
Q. And she might go either way, is that right?
A. Yes, sir.

* * * * * * *

[fol. 601] Q. You knew these vessls were carrying improper lights for international waters, didn't you?

Mr. Skeen: Objected to.

A. I knew that was not the right lights for vessels being towed.
Q. Either in international or inland waters, is that right?
A. Yes.
Mr. Skeen: Same objection.

* * * * * * *

Q. You didn't expect to have anybody on board the two destroyers until you got into the Delaware River?
[fols. 602-908] A. There was not any crew.

Mr. Skeen: Objected to.

Q. You did not expect to have anyone, did you?
A. Well, I expected—we would fix the lights—
Q. Will you answer the question?
A. I do not understand what you mean.
Q. When you left Wing's Neck for Baltimore with the two destroyers in tow did you expect to have any crew aboard the destroyers until you got into the Delaware River?
A. No crew on them, no.
Q. Did you ever tow any destroyers before this?
A. That is the first destroyers.

* * * * * * *

[fol. 909] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

IN ADMIRALTY

No. 2757

BOSTON IRON & METAL COMPANY, Libellant,

v.

SS "WINDING GULF", her engines, boilers, etc., and MASSACHUSETTS TRUSTEES OF EASTERN GAS & FUEL ASSOCIATES

FINDINGS AND OPINION ON DAMAGES—Filed March 22, 1949

CHESTNUT, District Judge:

This was an admiralty collision case in which an interlocutory decree of the court was filed September 5, 1947, after the filing on June 10, 1947 of an extended opinion of court, which is reported at 72 F. S. 50. The decree provided the damages should be divided. After long and unsuccessful negotiations between the parties to stipulate for the amount of damages, the question as to the amounts was recently submitted to the court for decision. As appears from the opinion heretofore filed, the libellant's vessel, an old and obsolete destroyer purchased for scrap value by the Boston Iron & Metal Company, was sunk and became a total loss as a result of the collision. The other ship involved, the Winding Gulf, was damaged by the collision. The principal controversy over the amount of damages sustained by the respective ships was with regard to the valuation to be placed on the obsolete destroyer known as the "I-24". From the evidence submitted to the court I make the following finding of facts.

1. At the time of the collision the Destroyer I-24 was [fol. 910] owned by Boston Iron and Metal Co., which corporation has since been renamed Boston Metals Co. (There being no significance to the time of change of name as to any issue here involved, the present shorter name is hereinafter used for purposes of convenience).

2. The I-24 was first commissioned by the United States Navy in 1919 and was originally named "Bancroft". She

was one of the fifty destroyers traded to the British before our entry into the war. After having been delivered to the British, she was renamed "St. Francis" and became a vessel of the Royal Canadian Navy.

3. Boston Metals Co. purchased the I-24 on July 2, 1945, from E. Frankel & Sons of Toronto for $6591 U. S. currency in her then condition at Sydney, Nova Scotia.

4. The I-24 was purchased exclusively for scrapping and could not under the terms of purchase be put to any other use.

5. As as result of the collision, the I-24 sank a short time thereafter and became a total loss.

6. The I-24 had been towed from Sydney to the point of her loss at an expense to Boston Metals Co. of $3,048.91.

7. For some time prior to July 2, 1945, and since said date, Boston Metals Co. has been engaged in the scrap iron and steel business dealing principally with the dismantling of ships (R. 24).

8. The I-24, at the time of her purchase by Boston Metals Co., was one of a group of six similar overage destroyers purchased by said corporation from said E. Frankel & Sons (R. p. 26).

9. The names of said six destroyers, amounts paid therefor, dates of their purchase, of their arrival at Baltimore [fol. 911] and of the completion of their dismantling by Boston Metals Co. are respectively as follows (R. pp. 26, 27):

Name	Price Paid	Towing Paid	Dates Purchased	Dates Arrived	Dates Dismantling Completed
Salisbury	$7000		10/12/44	5/31/45	2/28/46
Mansfield	7000		10/12/44	5/31/45	10/15/46
Buxton	6591		6/ /45	7/11/45	12/31/46
Annapolis	6591		6/ /45	7/11/45	6/ /46
Hamilton	6591		7/ 2/45	8/23/45	12/31/45
St. Francis	6591	*3048 91	7/ 2/45	LOST	

*Apportioned to place of sinking.

10. The said six destroyers were purchased over a period of time from October 1944 until July 1945, as a result of negotiations carried on by Mr. Morris Shapiro of Boston Metals Co., who made a visit to Canada some time in 1944, and made arrangements with Mr. Egmont Frankel whereby Boston Metals Co. agreed to pay E. Frankel & Sons a cer-

tain commission on any of these vessels on which they were the successful bidder from the Canadian Government; and as E. Frankel & Sons acquired these vessels, they in turn sold them to Boston Metals Co. at the bid price plus their commission (R. p. 26).

11. Between June and November 1945, Boston Metals Co. bid on two offerings of submarines at the Philadelphia Navy Yard but was not the successful bidder on either occasion (R. p. 53).

12. In November 1945, Boston Metals Co. submitted bids on fifteen destroyers offered by the United States Navy then lying at Cape May, New Jersey, and it was awarded said fifteen destroyers on December 6, 1945, at a price of $8,777. each, as is, where is (R. p. 53, p. 47).

13. Of said fifteen destroyers, at least seven were of the same original class as the I-24 (R. p. 71, pp. 75-6).

14. Boston Metals Co. paid approximately $750. per destroyer to tow each of said fifteen destroyers from Cape May, New Jersey, to its anchorage at Baltimore (R. p. 47).

[fol. 912] 15. Said fifteen destroyers began to arrive at Boston Metal Co.'s anchorage at Baltimore in the very early part of 1946 (R. p. 67).

16. Boston Metals Co. stored all destroyers and other vessels purchased for scrapping at an anchorage about one-half mile from its yard at Baltimore, where such vessels remained until they were taken to its yard for scrapping (R. p. 28).

17. Boston Metals Co. has, since its purchase of the I-24 built up and maintained a stockpile of destroyers and other metal vessels at Baltimore to be scrapped.

18. When the first of the fifteen destroyers awarded to Boston Metals Co. by the United States Navy on December 6, 1945, arrived at its anchorage at Baltimore, Boston Metals Co. was still working on dismantling some of the six Canadian destroyers above mentioned (R. p. 67).

19. There are still, as of February 1, 1949, in Boston Metal Co.'s anchorage at Baltimore some of the fifteen destroyers purchased by it from the United States Navy at Cape May, N. J. (R. p. 71).

20. The Boston Metals Co. claims the value of the destroyer at the time of its sinking was $46,449.32 as shown on

Libellant's Ex. No. 1. In this exhibit the estimated cost of dismantling the destroyer is given at $6.45 per gross ton for direct labor on 1123 gross tons but there is no detailed evidence as to the manner in which the estimate of $6.45 per gross ton for direct labor was arrived at except that it results from an estimate. Similarly the estimate of $3621.67 to cover overhead charges allocable to dismantling was an estimated percentage figure. Said figure of $46,449.32 is without deduction for the cost of the destroyer to the Boston Metals Co. and the towage expense paid by it to point of sinking.

[fol. 913] 21. At the time of collision the destroyer had no value as a vessel, having been bought for the sole purpose of conversion to metal scrap and having been sold on the condition that she be so converted.

22. Boston Metals Co. has for many years past been engaged in the ship breaking business and converting vessels to scrap. This business is a specialty with only a comparatively small number of companies engaged in it. It is necessary to buy vessels for conversion (such as obsolete destroyers of the type of I-24) as the opportunity occurs, in order to maintain an inventory.

23. Prior to acquiring the destroyer I-24 and five other vessels, the Boston Metals Co. had embarked on a long range program of establishing an inventory of vessels to be used for scrap and the said program involved the purchase of as many such vessels as the Company could acquire when offered for sale. The purchases of obsolete naval vessels both before and after the loss of the I-24 were made in connection with its prior determined intention to acquire as large an inventory as possible. It is not ordinarily possible for any Company in the ship breaking industry to buy obsolete vessels except as they are offered for sale at the discretion of the United States Government or the Navy Department.

24. In connection with its business the Boston Metals Co. has found it necessary to and did determine the approximate amount of the various ferrous and non-ferrous metals contained in a destroyer of the class and type of the I-24. These amounts are approximately shown in the libellant's Ex. No. 1, and the I-24 was acquired by the Boston Metals

Co. because of the prior determined amount of scrap contained in the vessel.

25. The price per ton on July 13, 1945 of the scrap metal contained in the I-24 were established by Regulations of the Office of Price Administration and such scrap was actually sold by libellant and others at said prices during July 1945. The prices shown on the Exhibit are the OPA prices pre- [fol. 914] vailing in July 1945 for scrap metal. The price of Thornycroft tubes and white metal as indicated on the Exhibit are determined by actual sales of such materials made during July 1945.

26. As a result of the collision the respondent and cross-libellant, Massachusetts Trustees of Eastern Gas & Fuel Associates, the owners of the steamer Winding Gulf, had extended repairs made in amounts aggregating $18,657.04, but there is an additional possible element of damages to the Winding Gulf with regard to the detention of the ship pending repairs. The ship was under charter to an agency of the United States Government and there is still an open and unsettled question between the Government and the respondent with regard to what net amount of damages may hereafter be determined to have accrued by virtue of the detention. Counsel are still negotiating with regard to this item, and have requested that there be no finding made on that particular point at the present time.

27. As an ultimate finding of fact, I find that the fair and reasonable value of the destroyer I-24 at the time of the collision and her total loss was $15,000.

Discussion

There is a very wide difference between the parties to this case with respect to the damage sustained by the libellant in the loss of the destroyer. Her owner contends that her value and consequent damages amounted to $46,449.32. Contrasted with this the owners of the Winding Gulf contend that the fair value of the destroyer was only $9,639.91, consisting of her cost in Nova Scotia plus expense of transporting her to the point of collision and loss. The determination of the value of the destroyer is difficult because it is impossible to find from the evidence any clear and definite sum that would reflect her market value at the time. Indeed

the destroyer had no market value. While classed as a ship [fol. 915] in the admiralty law, it is clear that she had no market value or indeed any value intrinsically as a ship. Her only value was what would result from the scrap value of her metal parts when broken up and a sale of the scrapped material at market prices, from which should be deducted the cost and expense in that operation. In this connection counsel for her owner refers to the only adjudicated case which has been called to my attention which involved a somewhat similar problem of valuation, where the court had the problem to value a dead ship that had no market value as a vessel. The C. H. Northam, 181 F. 985 (D. C. Mass. 1909). In that case the court said:

> "it can hardly be said that the ordinary rule for ascertaining the market value of a vessel is possible of application in her case. Evidently in the ordinary market for vessels she had no value, for the reasons stated by the master, and, instead of directing the inquiry to the market value, it was necessary to resort to other methods of appraisal. The master has taken the total value of the material contained in her, has deducted the total expense of breaking her up and getting the material out, and has allowed the balance of $413.79, then remaining, as her value for the purposes of this case. I am unable to see why this method of arriving at her value is not proper and just under the circumstances."

This case is persuasive in principle but it cannot be applied here to the extent and in accordance with the particular figures contained in the libellant's exhibit No. 1 which itemizes the estimated quantities of scrap metal which would have been realized from breaking up the ship and a sale thereof at OPA prices prevailing in July 1945, which produces a total of $57,314.34, from which is deducted the estimated cost of dismantling and of overhead expense in all aggregating $10,865.02, and produces a net balance of $46,449.32. Assuming the correctness of the stated market prices applied to the estimated quantities, it still appears that the cost of dismantling and the overhead cost thereof to the defendant is hardly more than an estimate, and in addition it seems clear enough that the net figure obtained must neces-

sarily have included the owner's profit in the operation. I am not sure but that there would have been other expenses [fol. 916] possibly in the nature of general selling expenses, which would have to be deducted from the proceeds of the sale of the scrap at market prices. I think, therefore, the evidentiary value of the exhibit must be given only the limited weight of indicating that the value of the destroyer at the time of the loss was substantially greater than her cost of purchase and expense of transportation, the latter apportioned to the place of loss. And in this same connection there was some evidence to the effect that the general experience of the business was that a destroyer of this type when bought for scrapping generally produced about $18,000 more than her cost. It seems to be well settled on the authorities that in the case of a total loss of a vessel as such the rule is well established that the measure of the owner's loss is the market value of the vessel at the time and place of the loss if this can be determined. The Umbria, 166 U. S. 404,421; Standard Oil Co. v. Southern Pacific Co. 268 U. S. 146,155.

It is apparently agreed by counsel for both parties in this case that the real value of the destroyer at the time of loss was only such value that she had for scrapping. And in this connection the proctor for the Winding Gulf invokes the rule of damages applicable to loss of cargo which is generally held to be the market (invoice) value at the port of shipment plus the cost of insurance, freight, loading and other similar expenses necessarily incurred in moving the goods from point of shipment to the collision, but without allowance for anticipated profits. The Scotland, 105 U. S. 24, 35; Smith v. Condry, 1 How. (42 U. S.) 28, 34; Standard Marine Ins. Co. v. Scottish Met. Co. 283 U. S. 284, 288; Guibert v. The British Ship George Bell, 3 F. 581, 584 (D. C. Md.)

Accordingly counsel for the Winding Gulf argues that the value of the destroyer was limited to her cost in Sydney, Nova Scotia, plus the apportioned towage expense to the point of collision, to wit, $9,639.91. But I am not satisfied [fol. 917] that this limited basis for valuation is the correct one to apply in this case. The rule which I think should be applied in this case is well stated by Mr. Justice Butler

for the Supreme Court in Standard Oil Co. v. Southern Pacific Co. supra, 268 U. S. 155, 156:

> "It is fundamental in the law of damages that the injured party is entitled to compensation for the loss sustained. Where property is destroyed by wrongful act, the owner is entitled to its money equivalent, and thereby to be put in as good position pecuniarily as if his property had not been destroyed. In case of total loss of a vessel, the measure of damages is its market value, if it has a market value, at the time of destruction. The Baltimore, 8 Wall. 377,385. Where there is no market value such as is established by contemporaneous sales of like property in the way of ordinary business, as in the case of merchandise bought and sold in the market, other evidence is resorted to. The value of the vessel lost properly may be taken to be the sum which, considering all the circumstances, probably could have been obtained for her on the date of the collision; that is, the sum that in all probability would result from fair negotiations between an owner willing to sell and a purchaser desiring to buy."

While the above stated rule was applied by the court in the case of a ship, which apparently had no market value as such, the rule is not materially different, so far as we are here concerned, from the rule that is customarily applied in federal land condemnation cases where the jury, at least in this district, is currently told in part, at least in cases where no definite market value is obtainable, that they should allow such value as they find on the best evidence in the case to be the sum which a willing buyer would pay to a willing seller. See also recent land valuation cases in this Fourth Circuit, United States v. 25.406 Acres of Land in Arlington County, Virginia, decided February 21, 1949; United States v. Powelson, 138 F. 2d 343.

In this case the destroyer had no value as a ship, and I think it would be unfair and unreasonable in determining her value as scrap to limit the valuation, as counsel for the Winding Gulf contends, to the mere basis of the cost and expense incurred by the owner, and thus treat this peculiar [fol. 918] kind of property merely as cargo to be valued

at invoice value of cost plus expenses. Indeed, as pointed out by Judge Parker in United States v. 25.406 Acres of Land, supra, market value in such a case is a mere hypothetical concept. While the valuation as exactly finally determined must be more or less arbitrary, as indeed jury verdicts necessarily generally are in land condemnation cases, it seems fairly clear to me that the fair value of the destroyer was more than the mere cost to the owner up to the time and place of the loss. Nor is the cost of replacement an important factor in this case by reason of the peculiar nature of the owner's business, the purposes for which the destroyer was bought. The particular business is a specialty and its success depends very largely on the "know how" of the proprietor with respect to both the opportunity to purchase at all and the price to be paid. This "know how" comes only from previous extended business experience, organization and practical affairs. The peculiar kind of property which is dealt with is not something that is commonly available in the way of ordinary business as in the case of merchandise bought and sold in the market. It is therefore necessary to resort to other criteria and factors to determine fair value in this case. Neither the cost of construction nor reconstruction is of any particular value in this case. No doubt the destroyer when originally built cost the United States more than $1,000,000; but by nature it apparently was of comparatively little value in 1945 to the then owner from whom the Boston Metals Company bought it. The best that can be done by the valuer is, as Mr. Justice Butler said in the Standard Oil Case, supra, to determine as the value "the sum that in all probability would result from fair negotiations between an owner willing to sell and a purchaser desiring to buy." And as he later said in the same connection (p. 156):

> "It is to be borne in mind that value is the thing to be found and that neither cost of reproduction new, nor that less depreciation, is the measure or sole guide. The ascertainment of value is not controlled by artificial rules. It is not a matter of formulas, but [fol. 919] there must be a reasonable judgment having its basis in a proper consideration of all relevant facts."

In applying this rule it seems clear to me that to the owner this destroyer at the time of loss had a value substantially greater than its cost to the libellant. As a practical test I think the evidence fairly leads to the view that considering all the relevant facts some person engaged in a similar business would fairly have been willing to pay for the destroyer as an entity at the time and place of loss substantially more than what it had cost the owner up to that time. It must be remembered that the purchase was made by one skilled in the particular business taking advantage of a particular opportunity not often afforded, and resulting from skill and knowledge of when, why and how to buy. Or, in other words, it may be said that the evidence as a whole fairly indicates that in the purchase the owner made a very good bargain and is entitled under the circumstances of the loss to have the damages fixed at a sum which would fairly pecuniarily reimburse him for the loss incurred.

Respondent and cross-libellant contends that an award to the libellant of more than the cost of the destroyer (to the libellant) and of the towage would be tantamount to an award of profits and that profits are not a proper element of damages. This contention results from too slavish an application of the rule of damages applicable to lost merchandise and fails to recognize the important distinction between value and profits. Value reflects an object's worth as of a certain past or present date, without regard for what it would or might be worth at a future date in a changed economic situation. This latter element is the profit element (which, when applicable, is only one element in the measure of damages) and has no application when the correct and only element and measure of damages is value at the present or a past date. The fact that the value of an article is more than its initial cost does not amount to an award of profits, and the difference cannot be so denominated. This increase results from the owner's skill [fol. 920] and perspicacity and from changes in the economic situation and is a known or ascertainable fact based on events in the past and is not an estimation or guess as to what will or might occur in the future. Mere repayment of what the owner has expended will not make him whole (the purpose of any measure of damages) when the lost

item cannot be replaced for what he expended to purchase it.

Counsel for the Winding Gulf emphasizes the fact in the evidence that some months after the loss of the particular destroyer, the Boston Metals Company also became the successful bidder for other destroyers of approximately the same metal tonnage at a cost of less than $10,000 each. But while I have given weight to this fact in the whole problem of valuation, I do not think it constitutes of itself an absolutely limiting factor because, as pointed out, the opportunity to buy materials of this kind is sporadic and uncertain as to time and place. Furthermore, another fact in evidence is that the success of the particular scrapping business depends not only on the application of experienced judgment as to prices to be paid and other prices bid, but on comparatively limited opportunities to buy at all, and the success of the business, therefore, depends, to some extent at least, upon the quantity of purchases possible at desirable prices. The final result is, and I have concluded, that the fair value of the destroyer at the time of the loss and the consequent damages for her loss should be fixed at $15,000.

W. Calvin Chesnut, U. S. District Judge.

[fol. 921] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

No. 2757

BOSTON IRON & METAL COMPANY, Libelant

v.

SS WINDING GULF, her engines, boilers, etc., and MASSACHUSETTS TRUSTEES OF EASTERN GAS & FUEL ASSOCIATES

CHARLES FRANCIS ADAMS, etc., Trustees of Eastern Gas & Fuel Associates

v.

BOSTON METALS COMPANY, formerly named BOSTON IRON & METAL COMPANY

FINAL DECREE—Filed February 18, 1953

IN ADMIRALTY

Whereas, an Interlocutory Decree was heretofore filed herein on or about September 5, 1947, providing for the equal division of the damages sustained by the SS WINDING GULF, and the damages sustained by reason of the loss of the Destroyer I-24, resulting from the collision of July 13, 1945, near Buzzards Bay, Massachusetts; and

Whereas, the Court was subsequently requested by the respective parties to determine the amount of their respective damages; and

Whereas, after testimony and arguments of counsel, the [fol. 922] Court rendered and filed herein its opinion dated March 22, 1949, holding (a) as an ultimate finding of fact that the fair and reasonable value of the Destroyer I-24 at the time of said collision and her total loss was Fifteen Thousand Dollars ($15,000.00); and (b) that as a result of said collision the owner of the SS WINDING GULF had extensive repairs made in amounts aggregating Eighteen Thousand Six Hundred and Fifty-Seven Dollars and Four

Cents ($18,657.04), exclusive of damages for detention pending repairs; and

Whereas, proctors for the SS WINDING GULF requested at the time of said hearing before the Court on the question of damages that a determination of the amount of damages sustained by her owners by reason of her being detained pending repairs be deferred to a future date; and whereas, proctors for the SS WINDING GULF and her owners have now informed the Court that no claim therefor will be asserted; and

Whereas, the Court has now been requested by proctors for both parties to enter its Final Decree herein in accordance with the said Interlocutory Decree of September 5, 1947, as to liability, and in accordance with its said findings and opinion of March 22, 1949, as to damages;

Now, therefore, it is this 18 day of February, 1953, by the United States District Court for the District of Maryland, in Admiralty,

Adjudged, Ordered and Decreed:

1. That Boston Metals Company (formerly named Boston Iron & Metal Company) sustained damages arising out of the loss of the Destroyer I-24 in the amount of Fifteen Thousand Dollars ($15,000.00) as heretofore determined by [fol. 923] the Court under said date of March 22, 1949, together with interest thereon at the rate of six per cent (6%) per annum from November 14, 1945 (the date of the filing of the Libel herein), to September 5, 1947 (the date of said Interlocutory Decree).

2. That Charles Francis Adams, et al, Massachusetts Trustees of Eastern Gas and Fuel Associates, owners of SS WINDING GULF at the time of the collision referred to in the pleadings, sustained damages as a result of said collision in the amount of Eighteen Thousand Six Hundred and Fifty-Seven Dollars and Four Cents ($18,657.04) as heretofore determined by the Court under said date of March 22, 1949, together with interest at the rate of six per cent (6%) per annum from November 14, 1945 (the date of the filing of the Libel herein), to September 5, 1947 (the date of said Interlocutory Decree).

3. That said Massachusetts Trustees of Eastern Gas

and Fuel Associates recover of and from said Boston Metals Company one-half (½) of the difference between their respective damages as aforesaid, viz., the amount of One Thousand Eight Hundred and Twenty-Eight Dollars and Fifty-Two Cents ($1,828.52), together with interest thereon at the rate of six per cent (6%) per annum from November 14, 1945, to September 5, 1947, in the amount of One Hundred and Ninety-Eight Dollars and Seven Cents ($198.07), a total of Two Thousand and Twenty-Six Dollars and Fifty-Nine Cents ($2,026.59), together with interest on said last named amount at the rate of six per cent (6%) per annum from March 10, 1953, until paid.

4. That no costs be awarded to any party as against any [fols. 924-937] other party to these proceedings.

5. That unless said recovery of said Massachusetts Trustees of Eastern Gas and Fuel Associates against said Boston Metals Company in the amount of Two Thousand and Twenty-Six Dollars and Fifty-Nine Cents ($2,026.59), as above provided, be paid on or before March 10, 1953, said Massachusetts Trustees of Eastern Gas and Fuel Associates may have execution against said Boston Metals Company and against its goods, chattels and lands forthwith to satisfy this Decree.

6. That all stipulations, if any, heretofore filed by any of the parties to these proceedings be cancelled and discharged of record.

W. Calvin Chesnut, United States District Judge.

Approved as to Form:

John H. Skeen, Jr., Skeen, Wilson & Coughlin, Proctors for Boston Metals Company, Libelant and Cross-Respondent. Niles, Barton, Yost & Dankmeyer, Bingham, Dana & Gould, Proctors for Massachusetts Trustees of Eastern Gas & Fuel Associates, Cross-Libelants and Respondents.

[fol. 938] IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 6637

BOSTON METALS COMPANY, Formerly Named Boston Iron and Metal Company, as Owner of the Canadian Destroyer "St. Francis", Appellant,

versus

S/S "WINDING GULF" and MASSACHUSETTS TRUSTEES OF EASTERN GAS AND FUEL ASSOCIATES

Appeal from the United States District Court for the District of Maryland, at Baltimore

CHRONOLOGICAL LISTING OF DOCKET ENTRIES

June 23, 1953, record on appeal filed and cause docketed.

Same day, original exhibits certified up.

Same day, appearance of John H. Skeen, Jr., entered for the appellant.

June 25, 1953, appearance of Theodore R. Dankmeier entered for the appellees.

July 9, 1953, appearance of Charles S. Bolster entered for the appellees.

September 19, 1953, appearance of Eugene M. Feinblatt entered for the appellant.

October 20, 1953, brief and appendix for appellant filed.

November 6, 1953, brief and appendix for appellees filed.

November 7, 1953, reply brief and appendix for appellant filed.

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—Dated November 11th, 1953, Omitted in Printing

[fol. 939] IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 6637

BOSTON METALS COMPANY, Formerly Named Boston Iron and Metal Company, as Owner of the Canadian Destroyer "St. Francis", Appellant,

versus

S/S "WINDING GULF" and MASSACHUSETTS TRUSTEES OF EASTERN GAS AND FUEL ASSOCIATES, Appellees

Appeal from the United States District Court for the District of Maryland, at Baltimore. In Admiralty.

Before Parker, Chief Judge, and Soper and Dobie, Circuit Judges

OPINION—Filed January 4, 1954

John H. Skeen, Jr. (William A. Skeen and Eugene M. Feinblatt on brief) for Appellant, and Charles S. Bolster (Theodore R. Dankmeyer, Seymour P. Edgerton, Bingham, Dana & Gould, and Niles, Barton, Yost & Dankmeyer on brief) for Appellees.

SOPER, Circuit Judge.

A collision on the night of July 12, 1945 at sea outside the southernmost end of Buzzards Bay, Massachusetts, between the steam collier Winding Gulf and an obsolete destroyer which formerly belonged to the United States and was then in tow of the tug Peter Moran, caused damages to the ship and the total loss of the destroyer. On November 14, 1945 Boston Iron and Metal Company, a Maryland corporation which owned the destroyed, filed a libel against the ship and her owners in the District Court of Maryland. Thereupon Massachusetts Trustees of Eastern Gas and Fuel Associates, a voluntary association organized under the laws of Massachusetts, filed a claim to the ship as owners thereof and also filed a cross libel in personam against Boston Metals.

The District Judge held upon the trial of the case that the ship was in fault in not changing her course or speed, and [fol. 940] that the owner of the destroyer was at fault in respect to lights and absence of crew on the destroyer, and that both faults contributed to the collision, and accordingly entered an interlocutory decree for division of damages. See the opinion of Judge Chesnut in The St. Francis, 72 F. Supp. 50.* The judge subsequently found that Boston Metals had suffered damages in the sum of $15,000 for the loss of the destroyer and that Massachusetts Trustees had suffered damages for injury to the ship in the sum of $18,657.04, and entered final judgment in favor of Massachusetts Trustees in the sum of $1,828.52 with interest. See *Boston Iron & Metals Co.* v. *S. S. Winding Gulf*, 85 F. Supp. 896.

Boston Metals was held liable for the faults of the destroyer although she was a dead ship unmanned and without motive power and was being towed by the tug Peter Moran when the collision took place. Ordinarily the faults of navigation of the tow under such circumstances could not be imputed to the owners of the tow but only to the tug. *Sturgis* v. *Boyer*, 24 How. 110; *The Eugene F. Moran*, 212 U. S. 466; *The John D. Rockefeller*, 4 Cir. 272 Fed. 67. In this case, however, there was a special form of contract between Boston Metals, the owner of the destroyer, and the Foundation Maritime, Ltd., a Canadian corporation which agreed to supply the tug for the towage of the destroyer and an accompanying ship from Sydney, Nova Scotia, to Baltimore, Maryland, for $11,000, with the understanding that the services of the towing company would be supplied in accordance with the Standard Towing Conditions attached to and made a part of the contract as follows:

> "2. The services will be supplied upon the condition that all towing, moving, shifting, docking, undocking or other handling of a vessel or craft of any character by a tug or tugs owned or employed by the Tug Com-

---

* The destroyer, originally called the U. S. S. Bancroft, was one of fifty destroyers transferred to the British early in World War II, and was named the St. Francis and operated by the Canadian Government.

pany is done at the sole risk of such vessel or craft and of the owners, charterers or operators thereof, and that the Master and crew of such tug or tugs used in the said services become the servants of and identified [fol. 941] with such vessel or craft and their owners, and that the Tug Company only undertakes to provide motive power.

3. The Tug Company will not be responsible for the acts or defaults of the Master, or crew of such tug or tugs, or any of their servants or agents or else whosoever, nor for any damages, injuries, losses or delays from whatsoever cause arising that may occur either to such vessel or craft, or property or persons on board thereof, or to any other ship or vessel or property of any kind whether fixed or movable and the Company shall be held harmless and indemnified by the Hirer against all such damages, injuries, losses and delays, and against all claims in respect thereof."

The District Judge held that these conditions of the contract legally resulted in making the faults with respect to lights and absence of crew on the destroyer directly attributable to Boston Metals, her owner, and that these faults might be ascertained in the pending suit without being first litigated in a suit by the Winding Gulf against the tug, because they constituted faults of the master of the tug who, by the terms of the agreement, became in this respect the servant of Boston Metals.

The tug, Peter Moran, was not brought into the instant suit because of lack of jurisdiction in the Maryland court, but subsequently the Massachusetts Trustees filed a libel for damages to the collier against the tug in the Southern District of New York. The New York suit was still pending when the decision in the instant case was filed, but has since been decided by Judge Coxe in *Adams* v. *The Peter Moran*, D. C. S. D. N. Y., 94 Fed. Supp. 520. The case was heard upon the deposition of the master of the tug taken in the Maryland suit and upon a stipulation that the facts were as found by Judge Chesnut in his opinion; and the judge held upon the record, as Judge Chesnut had previously found, that both the ship and the tug were at fault and that the faults of both contributed to the collision. He also held

that the provisions of the towing contract making the master of the tug the servant of the owner of the tow merely served to fix the relationship between the tug and the Boston Metals, and could not affect the liability of the tug [fol. 942] or the liability of the tow, as independent vessels, each one liable to the collier for its own fault. He therefore entered a decree dividing the damages equally among all three vessels, since all were equally at fault, but providing that the collier should not receive more than two-thirds of her damages, taking into account the amount collected from Boston Metals under the Maryland decree.

Boston Metals contends that the great preponderance of the evidence shows that the collision was due solely to bad navigation on the part of the Winding Gulf without any fault on the part of the tug; and that even if the tug was negligent in respect to lights or the absence of a crew on the tow, these faults did not contribute to the accident because the navigators of Winding Gulf had ample warning of the presence of the flotilla by the whistles and the towing lights of the tug.

We do not agree. The vessels approached one another at night in a fog which had set in during the previous hour. The course and direction of the tug was southwest by west while the Winding Gulf was proceeding east by one-half north. The steamer was displaying the usual lights and the tug, in addition to other lights, was showing three lights vertically arranged indicating a tow but not the length thereof. There were two destroyers in tow of which the first had one white light in the proper place, and the second, the St. Francis, had two lights indicating that it was the last vessel in the flotilla. The steamer and the tug each sounded fog signals which were heard by the other and each saw the other's light when one-half mile apart. When they came abreast they were one-quarter of a mile apart. The length of the flotilla was three-fifths of a mile and although the master of the Winding Gulf was aware of the fact that he was approaching a flotilla and although he was not able to determine the length of the tow on account of defective lights on the destroyers, he negligently assumed that it was not more than one-fourth of a mile long and did not make sufficient change of course to clear it, so that the stem of the steamer struck the starboard aft side of the St. Francis.

The record supports the findings of Judge Chesnut that both vessels were at fault, for the reasons set out and discussed in his opinion; and we conclude, as did Judge Coxe [fol. 943] in the New York case, that both vessels were at fault and that the damages should be divided.

The major attack on this appeal is directed against the holding of the District Judge that the faults of the tug are attributable to Boston Metals because of the inclusion of the towing conditions in the agreement above set out. Preliminarily, the libellant questions the existence of the contract as set out in the form of a letter from the towing company to Boston Metals; but the letter was produced and identified by the libellant as the governing towage contract and was offered in evidence by the respondent. The libellant objected to its admissibility on the ground that it was a private contract between Boston Metals and the towing company; that its validity was doubtful; and that it was irrelevant to the controversy relating to the liability of the parties to the collision. These objections, however, were overruled and the document was received in evidence. There can be no doubt that it was recognized by the parties to the litigation as the authentic agreement under which the towing operation was conducted.

We come then to the question whether for the purposes of this case the contract changed the settled rule that a tug is solely responsible for the fault of an inert tow of which it has entire charge. The case is governed in our opinion by the decision in *Sun Oil Co.* v. *Dalzell Towing Co.*, 287 U. S. 291, wherein the court sustained a towing contract between a shipowner and a towing company which was designed to govern transactions between them. It provided that when the captain of any tug engaged in the services of towing a vessel, using its own propelling power, goes on board the vessel he becomes the servant of the owners in respect to the giving of orders to any of the tugs engaged and in respect to the handling of the vessel; and neither the tugs nor their owners should be liable for any damage resulting therefrom in a towing service. Under this contract three tugs undertook to dock a tanker which was using her own power, and the captain of one of them went aboard the ship and acted as pilot, and during the operation the ship ran aground.

The court found that the tugs were not at fault in the grounding, and held also that the shipowner could not recover for the negligence of the tug captain because under the agreement the captain, while on board and acting as pilot, was [fol. 944] the servant of the shipowner and the towing company was not responsible for any act of omission on his part. It was said that the validity of the contract could not be reasonably doubted since the towing company was not a common carrier, the parties were on an equal footing and there was no rule of public policy which denied the effect of the intention expressed in the agreement. The provision that the tug captain while on the ship should be the servant of her owner was held to be an application of the well established rule that if one puts his employee at the disposal of another, such employee is deemed to be the employee of the latter and not of the former; and it was said that it would be unconscionable for the ship owner, upon the occurrence of a mishap, to repudiate the agreement upon which it obtained the service.

Upon the authority of this case the validity of an analogous provision of a towing contract, exempting the tug from liability for damages under certain circumstances, was upheld by the Sixth Circuit in *Great Lakes Towing Co.* v. *Bethlehem Transportation Corp.*, 6 Cir., 65 F. 2d 543, and *Great Lakes Towing Co.* v. *American SS Co.*, 6 Cir., 165 F. 2d 368. A clause in the agreement declared that when a vessel was towed stern first by one tug the service would be under the control of the master of the vessel and the tug would not be liable for any damages sustained by a collision of the tow with any other craft or object. The exemption of the tug was not given effect in these cases because the master of the tug acted upon his own initiative and did not in fact place his vessel under the directions of the master of the ship. Nevertheless it was held, in accord with *Sun Oil Co.* v. *Dalzell Towing Co.*, 287 U. S. 291, that had the master of the tug acted as contemplated in the contract, no liability on the part of the tug would have arisen because in such event the master and crew of the tug would have become *pro tempore* servants of the tow.

The above decisions were concerned only with the effect of the towing contract as between the parties thereto, and

the clause was enforced, when its conditions were met, by relieving the tug owner and tug from liability for damages for injury to the tow. The effect of the contract upon the rights of third parties to recover damages from either or both of the contracting parties was not involved. Such a [fol. 945] right is asserted in the instant case in the claim of the owner of the Winding Gulf to recover from the owner of the tow the damages caused by the negligent operation of the tug.

The tug is not before us since she refused to submit to the jurisdiction of the court and come into the case. She was, however, held liable in the New York suit; and in other cases the liability of the tug to third parties for negligent operation has been sustained notwithstanding the presence of a pilotage clause in the towage contract. See *Robins Drydock & Repair Co.* v. *Navigazione Libera Triestina*, 154 N. Y. Misc. 788, affirmed 261 N. Y. 455; *Moran Towing & Transportation Co.* v. *Navigazione Libera Triestina*, 2 Cir., 92 F. 2d 37. We are not called upon to decide whether the owner of a tug or the tug itself, which is operating under a contract containing the standard towing conditions, may ever escape liability to a third party for injuries caused by its negligence. We have merely to determine whether liability of the owner of a tow to third parties may be based on such an agreement. In *Moran Towing & Transportation Co.* v. *Navigazione Libera Triestina*, supra, such a contract was enforced in a suit against the owner of the tow by the owner of the tug which had been compelled to pay damages to an injured third party; and we see no reason why it should not be given effect in a suit by an injured third party against the owner of the tow. We know of no principle of law which forbids a person who employs another to perform an undertaking for him, in which the other has full control of the operation, from agreeing that he will assume the burdens which an independent contractor would ordinarily bear. Such a contract of indemnity is not unusual. Whether the contract in the instant case was made because the voyage from Sydney to Baltimore was deemed unusually hazardous, or because the owner of the tow was given a lower rate, is immaterial. The contract was deliberately assumed and it would be unconscionable for the owner of the tow to

repudiate it after the accident occurred. There is no difficulty in the assertion of the right by the ship in this case without first establishing the negligence of the tug in a separate suit. The libel was filed by the owner of the tow who had agreed to take the risk of the enterprise and pay any damages that might be incurred, and as was said by Judge Learned Hand in the Kookaburra, 2 Cir., 69 F. 2d 71, 73, [fol. 946] "the admiralty, whose procedure is especially plastic, can skip the by-ways and head direct for the goal."

Affirmed.

IN THE UNITED STATES COURT OF APPEALS

No. 6637

BOSTON METALS COMPANY, Formerly Named Boston Iron and Metal Company, as Owner of the Canadian Destroyer "St. Francis", Appellant,

vs.

S/S "WINDING GULF" and MASSACHUSETTS TRUSTEES OF EASTERN GAS AND FUEL ASSOCIATES, Appellees

Appeal from the United States District Court for the District of Maryland

DECREE—Filed January 4, 1954

This cause came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decree of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed with costs.

Morris A. Soper, U. S. Circuit Judge

[fol. 947] [File endorsement omitted.]

[fol. 948] IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 6637

THE BOSTON METALS CO., formerly named Boston Iron and Metal Company as owner of the Canadian Destroyer, "St. Francis," Appellant,

vs.

S/S WINDING GULF AND MASSACHUSETTS TRUSTEES TO EASTERN GAS AND FUEL ASSOCIATES, Appellees.

PETITION FOR REHEARING—Filed February 3, 1954

Appellant herein prays for rehearing of the decision of this Court dated January 4, 1954, affirming a final decree in favor of cross-libelants-appellees owners of S/S WINDING GULF entered in the United States District Court for the District of Maryland on February 19, 1953.

The principal issue was whether appellant, owner of an inert tow wholly under the direction and control of a towing vessel, could, solely by reason of conditions contained in a contract between it and the towing company, be held di- [fol. 949] rectly liable to the owners of a third vessel with which the tow collided because of fault of those in charge of the navigation of the tug and the third vessel. There was no serious contention that the tow could be liable in the absence of such a contract.

The provisions of the towage contract considered in this connection were:

1) a provision declaring that the master and crew of the tug became servants of the owners of the towed vessel, and

2) a provision whereby the owner of the towed vessel agreed to indemnify the owners of the tug against any damages arising out of the towage.

The District Court based its decision entirely on the first of these two provisions, stating that "no question of indemnity could be litigated in this case." Accordingly,

the case was briefed and argued before this Court on behalf of appellant with a view to establishing that a contract declaring the master and crew of a tug to be the servants of the owners of a towed vessel cannot, standing alone, render the owner of the tow liable directly to a third party not a party to it, where all other evidence plainly showed that the master and crew of the tug were in fact not acting as agents of the owner of the tow. However, in affirming the District Court, this Court did not specifically pass on the question of whether that provision had the effect attributed to it by the District Court. Instead, this Court said:

> "* * * We have merely to determine whether liability of the owner of a tow to third parties may be based on such an agreement. In *Moran Towing & Transportation Co. Navagazione Libera Triestine*, (2 Cir. 92 Fed. 437) such a contract was enforced in a suit against the [fol. 950] owner of the tow by the owner of the tug which had been compelled to pay damages to an injured third party; and we see no reason why it should not be given effect in a suit by an injured third party against the owner of the tow."

Moran Towing & Transportation Co. v. Navigazione Libera Triestine, supra, involved only the indemnity feature of the contract as between tug and tow. That case was not even commenced until after the tug had been held liable to pay damages to a third party (in a suit brought by the third party against both tug and tow, and in which the tow was specifically exonerated. *Robins Drydock & Repair Co. v. Navigazione Libera Triestine*, 154 N. Y. Misc. 788, aff'd. 261 N. Y. 455). By the above quoted language this Court seems to base its decision on a direct application of the indemnity agreement, even though there was no appeal from the District Court's decision that this feature of the contract was not before it, and in spite of the fact that appellees themselves never contended that appellant was liable to them directly because of it, but rather, throughout the entire litigation, disclaimed any intention to rely on it.

Petitioner respectfully submits that this Court's holding

the indemnity agreement directly applicable here is contrary to established legal principles. An injured third party cannot recover against an indemnitor directly, since the contract of indemnity is not for his benefit, (Corbin *on Contracts*, Sec. 779 C, pp. 42-3), and it was never contended by proctors for appellees that this could be done. To the contrary, it was specifically recognized throughout by the District Court that it could not be done. Accordingly, since no issue with respect to the indemnity agreement was [fol. 951] properly before this Court there was heretofore no necessity nor opportunity to brief and argue the point on behalf of appellant. But now, because this Court is making the point for the first time, petitioner respectfully urges and justice requires that a rehearing be granted before the matter is finally disposed of on this basis.

In addition, and of more serious consequence, because there was heretofore no necessity nor opportunity for it petitioner did not introduce evidence available to it relating to circumstances surrounding the making of the contract and bearing on its enforceability against petitioner by the towing company strictly as an indemnity agreement. The probability of subsequent litigation against Boston Metals by Moran, the towing company, in which such evidence would be relevant and necessary to a successful defense was and is anticipated. But this Court's decision has placed petitioner in an indefensible position in such a suit on the indemnity agreement and seems to foreclose all question as to its enforceability. Thus, although in actual fact, circumstances were present which would render the indemnity agreement unenforceable against Boston Metals by Moran, these circumstances have not been shown and cannot be shown unless a rehearing is granted.

Petitioner if given an opportunity can produce evidence establishing that at the time it was confronted with the necessity for moving these destroyers in July of 1945, Foundation Maritime had a virtual monopoly in Eastern Canadian seaports, and it can be affirmatively shown that the tow would not have been moved at all unless the towing conditions contained in the contract in this case were agreed to.

[fol. 952] In *Sun Oil Company v. Dalzell Towing Co.*, 287 U. S. 291, the Supreme Court said:

> "Respondent had no exclusive privilege or monopoly in respect of the services that petitioner desired to have performed for its tanker and petitioner was under no compulsion to accept the terms of respondent's pilotage clause. There is nothing to suggest that the parties were not on equal footing or that they did not deal at arms length."

Thus, the Court recognizes that where the relationship is such that the parties have not equal bargaining power and one of them must either accept what is offered or be deprived of the advantages of the relationship, the contract will not be enforced. This Court has itself recognized this well established rule and in *Fairfax Gas & Supply Co. v. Hadary*, 151 F. 2d 939 at pages 940-1 quotes with approval from 17 *C. J. S., Contracts*, Sec. 262, page 645, 12 Am. Jur. 684 and 6 Williston *on Contracts* (Rev. Ed.), Sec. 1751C, in all of which the rule is announced. See also "*The Significance of Comparative Bargaining Power in the Law of Exculpation*," 37 Col. L. R. 248, and 175 A. L. R. 1, particularly Section 12, entitled "*Exculpated Party occupying quasi-monopolistic position*" and Section 55, pp. 110-113.

It is therefore respectfully suggested that under all the circumstances of this case, justice requires that petitioner be granted a rehearing and an opportunity to present evidence which, because of this Court's new conception of petitioner's liability under the contract, becomes relevant for the first time in this litigation. If a rehearing is granted, it will be shown that indemnity could not, have been enforced directly against petitioner by Moran. If denied, this Court's action would have the effect of enforcing a contract indirectly, which could not lawfully be enforced directly.

[fol. 953] Wherefore, Petitioner prays,

(1) That a rehearing be granted in this case;

(2) That pursuant to the provisions of Supreme Court Admiralty Rule No. 45, an opportunity be given to submit evidence in such form as may be approved by this Honorable Court, to show facts not heretofore established which

would be relevant in a suit against petitioner by the towing company to enforce the indemnity agreement; and

(3) That the decree below be modified to dismiss the cross-libel against Boston Metals and to direct payment by appellees to Boston Metals as owner of the destroyer, I-24, the amount of its damages with interests and costs.

The Boston Metals Company, Appellant, By: John H. Skeen, Jr., Proctor for Appellant.

John H. Skeen, Jr., William A. Skeen, Eugene M. Feinblatt, Proctors for Appellant.

I hereby certify that the foregoing petition is presented in good faith and not for delay and I believe that this petition is based on meritorious grounds.

John H. Skeen, Jr., Proctor for Petitioner.

[fol. 954] In the United States Court of Appeals

February 3, 1954, petition of appellant for stay of mandate filed.

Order Staying Mandate—Filed February 5, 1954

Upon the application of the Appellant, by its counsel, and it appearing that on February 3, 1954, it filed a petition for a rehearing in the above entitled case,

It is now here ordered that the mandate in this case be, and the same is hereby, stayed pending the action of the Court on the said petition for a rehearing.

John J. Parker, Chief Judge, Fourth Circuit.

In the United States Court of Appeals

Order Denying Rehearing—Filed February 10, 1954

This Court having rendered its decision affirming the decision of the United States District Court for the District of Maryland, the Appellant having on February 3, 1954,

presented to the Court a petition for a rehearing of the said cause, and the same having been fully considered.

It is now here ordered by this Court that the rehearing asked for be and the same is hereby denied.

John J. Parker, Chief Judge, Fourth Circuit; Morris A. Soper, United States Circuit Judge; Armistead M. Dobie, United States Circuit Judge.

[fol. 955] February 17, 1954, mandate issued and transmitted to the Clerk of the District Court at Baltimore, Maryland, in due form.

Same day, record on appeal and original exhibits returned to the Clerk of the District Court at Baltimore, Maryland.

March 17, 1954, record on appeal and original exhibits received from Clerk of the District Court.

[fol. 956] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 957] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1954

No. 70

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed October 14, 1954

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
MAY 1 0 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 78

BOSTON METALS COMPANY, FORMERLY NAMED BOSTON IRON AND METAL COMPANY, AS OWNER OF THE CANADIAN DESTROYER "ST. FRANCIS",

Petitioner,

VS.

S/S "WINDING GULF"

AND

MASSACHUSETTS TRUSTEES OF EASTERN GAS AND FUEL ASSOCIATES,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOHN H. SKEEN, JR.,
WILLIAM A. SKEEN,
EUGENE M. EINBLATT,
Proctors for Petitioners.

The Daily Record Co., Baltimore 3, Md.

SUBJECT INDEX

	PAGE
I. QUESTION PRESENTED	2
II. JURISDICTION AND OPINIONS BELOW	2
III. STATEMENT OF THE MATTER INVOLVED	3
IV. REASONS RELIED ON FOR ALLOWANCE OF THE WRIT	6
V. CONCLUSION	16

TABLE OF AUTHORITIES CITED

Adams v. The Peter Moran, 94 F. Supp. 520	3
Bisso, Jr., Receiver, et al. v. Inland Waterways Corp., 114 F. Supp. 713	6
Bisso, Jr., Receiver, et al. v. Inland Waterways Corp., (5th CA), as yet unreported	2, 9
Brenta II, 154 N.Y. Misc. 788, (1931), aff'd. 261 N.Y. 455, cert. den. 290 U.S. 656	11, 12, 13
Compania de Navegacion v. Firemen's Fund Insurance Co., (The Wash Gray), 227 U.S. 66 (1928)	7, 8, 9
Eugene F. Moran, The, 212 U.S. 466	6
German Alliance Ins. Co. v. Home Water Supply Co., 226 U.S. 220	15
Great Lakes Towing Company v. American SS Company, (1948), 165 F. 2d 368	9
Hall Scott Motor Car Co. v. Universal Insurance Company, (1941), 122 F. 2d 531	9
Isbrandtsen Company v. Local 1291 of International Longshoreman's Association, (1953), 204 F. 2d 495	15
Liverpool B. & R. P. Steam Navigation Company v. Brooklyn Terminals, 251 U.S. 48	6
Moran Towing and Transportation Company v. Navigazione Libera Triestine, S.A., 92 F. 2d 37	5

Mylroie v. British Columbia Mills Tug & Barge Co., (9th CA), 268 F. 449, (1920), aff'd. on other grounds, 259 U.S. 1 ..... 7, 9
Oceanica, The, (2nd CA), 170 F. 893, (1909), cert. den. 215 U.S. 599 7
Patterson Oil, Inc. v. Tug Port Covington, (D.C. E.D., Pa.), (1953), 109 F. Supp. 953 11
Patterson Oil, Inc. v. Tug Port Covington, (3rd CA), 205 F. 2d 694 (1953) 11
Petterson Lighterage Company v. Tug J. R. Russell, (1949), 87 F. Supp. 467 9
Publicker Industries, Inc. v. Tugboat Neptune Company and Tugboat Triton Company (William J. Worth) (3rd CA), 171 F. 2d 48 (1949) 10, 13
Restatement of Contracts 15
Robins Drydock & Repair Co. v. Flint, (1927), 275 U.S. 305 ..... 14, 15
Robins Drydock & Repair Co. v. Navigazione Libera Triestine, S.A., and Moran Towing & Transportation Company, Inc. (Brenta II), 154 N.Y. Misc. 788, (1931), aff'd. 261 N.Y. 455, cert. den. 290 U.S. 656 ..... 11, 12, 13
Robinson on Admiralty, 1939 ..... 7, 10
Steamer Syracuse, The, 79 U.S. 167 ..... 7, 8, 9
Sturgis v. Boyer, 24 Howard 110 ..... 6, 12
Sun Oil Company v. Dalzell Towing Company, 287 U.S. 291 ..... 6, 7, 8, 9, 14
Texas Company v. Lea River Lines, Inc., (D.C. Del.), 109 F. Supp. 266 9
Texas Company v. Lea River Lines, Inc., (3rd CA), 206 F. 2d 55 9
William J. Worth, 171 F. 2d 48 ..... 10, 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. ------

BOSTON METALS COMPANY, FORMERLY NAMED BOSTON IRON AND METAL COMPANY, AS OWNER OF THE CANADIAN DESTROYER "ST. FRANCIS",

Petitioner,

VS.

S/S "WINDING GULF"

AND

MASSACHUSETTS TRUSTEES OF EASTERN GAS AND FUEL ASSOCIATES,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the decision of the Court of Appeals for the Fourth Circuit affirming a decree of the District Court for the District of Maryland; and in support of its petition respectfully shows:

I.

QUESTION PRESENTED

When an inert tow, wholly under the direction and control of a towing vessel, is brought into collision with a third vessel through negligence of the master of the tug, may the owner of the tow be held directly liable in personam to the owner of the third vessel solely by reason of a contract between the owners of the tug and tow, (to which the owner of the third vessel was a stranger) providing that all towing is done at the sole risk of the tow, that the owner of the tow will indemnify the owner of the tug for damages to third vessels and containing a provision declaring the master of the tug to be the agent and servant of the owner of the tow?

The affirmative answer of the Fourth Circuit to this question necessarily involves the equally important underlying question of the validity of "pilotage clauses" and provisions in towing contracts stipulating against tug's negligence, as to which there is much uncertainty and conflict among lower federal courts. Petition for writ of certiorari to the Court of Appeals for the Fifth Circuit in a case presenting one significant aspect of this matter for determination is presently pending before this court.[1]

II.

JURISDICTION AND OPINIONS BELOW

Jurisdiction is based on 28 USC, Section 1254 (1).

The district court's opinion on liability is reported in 72 F. Supp. 50, and is reprinted at Record, pages 4-17. The

[1] *Bisso, Jr., Receiver, et al. v. Inland Waterways Corp.* (CA 5th), decided March 26, 1954, as yet unreported, affirming DC ED La., 114 F. Supp. 713, in which "modified pilotage" and "release towage" clauses were applied in a case of towage of a dumb barge.

district court's opinion on damages is reported in 85 F. Supp. 806, and is found at Record, pages 18-29. The opinion of the court of appeals is reported in 209 F. 2d 410 (adv.), and is found at Record, pages 41-48. The order denying rehearing is unreported and is found at Record, page 56.

III.

STATEMENT OF THE MATTER INVOLVED

This is a suit in admiralty instituted by petitioner against the steam Collier WINDING GULF, *in rem*, and her owners, *in personam*, to recover for loss of petitioner's vessel, Destroyer I-24, (otherwise known as the ST. FRANCIS) resulting from a collision with the WINDING GULF, which occurred while the I-24 was an inert tow, unmanned and without motive power, wholly under the direction and control of the tug PETER MORAN. Since jurisdiction could not be obtained over the tug or its owners in the District of Maryland, the tug was not before the court.[2] The WINDING GULF was damaged in the collision, and her owners filed a cross-libel *in personam* against petitioner.

The towage was being performed under a contract[3] which included the following clauses:

> "Tug services will be supplied upon the condition that all towing, moving, shifting, docking, undocking or other handling of a vessel or craft of any character by a tug or tugs owned or employed by the Tug Company is done at the sole risk of such vessel or craft and of the owners, charterers or operators thereof, and that the Master and crew of such tug or tugs used in the said services become the servants of and identified

[2] Owners of WINDING GULF sued the tug and owners in the Southern District of New York which resulted in a decision of both at fault and a decree dividing damages. *Adams v. The Peter Moran*, 94 F. Supp. 520. For Interlocutory Decree of Judge Coxe see Record, pages 38-39.

[3] Reprinted in full, Record, pages 1-3.

with such vessel or craft and their owners, and that the Tug Company only undertakes to provide motive power.

"The Tug Company will not be responsible for the acts or defaults of the Master, or crew of such tug or tugs, or any of their servants or agents or else whosoever, nor for any damages, injuries, losses or delays from whatsoever cause arising that may occur either to such vessel or craft, or property or persons on board thereof, or to any other ship or vessel or property of any kind whether fixed or movable and the Company shall be held harmless and indemnified by the Hirer against all such damages, injuries, losses and delays, and against all claims in respect thereof.

"Such exemption from liability shall apply regardless of whether such vessel or craft assists in the services with its own steam or power or in any other way, and irrespective of whether any employee of the Tug Company or the Master, or any of the crew of such tug or tugs is at the time of said services on board of such vessel or craft, or in command thereof.

"The foregoing conditions shall apply to any damages, injuries or loss from whatsoever cause arising that may occur to the vessel or craft requiring the tug or tugs or to any other vessel or craft, or to any person or property on board thereof, or to any other property whether fixed or movable, while such tug or tugs is or are in attendance upon or fast to or engaged in any maneuver for the purpose of making fast to, or disengaging from or proceeding clear from the vessel or craft requiring the tug or tugs, provided however that the said conditions shall not apply to loss or damage to the tug or tugs or to property on board the tug or tugs or to damages for personal injuries to or loss of life of members of the crews of the tug or tugs or persons on board thereof, unless such loss or damage or such damages for personal injuries or loss of life shall have been caused or contributed to by the fault or negligence of the vessel or craft requiring the tug or tugs."

The district court found that the collision was the result of negligence of both the WINDING GULF and the master of the tug and, by imputing the fault of the master of the tug to the owner of the tow, held petitioner liable on the cross-libel and entered decree dividing damages. The court held that the master of the tug "by the terms of the contract became" the servant of the owners of the tow, that the provisions of the contract thus legally resulted in making his faults directly attributable to the owner of the tow, and that "these faults may be ascertained in this case without the circuity of action due to their first being litigated in a suit by the WINDING GULF against the tug."[4]

In affirming, the court of appeals, without commenting on the district court's reasoning that the contract made the tugmaster petitioner's servant, seems to give conclusive effect to the contract as an indemnity agreement. Although the district court had assumed that "no question of indemnity arising under the contract" could be litigated in the case,[5] the court of appeals, after noting that "such a contract of indemnity (was) not unusual" and that such a contract had been "enforced" in a suit against the owner of a tow by the owner of a tug which had been compelled to pay damages to an injured third party,[6] said it saw "no reason why it should not be given effect in a suit by an injured third party against the owner of the tow. . . ."[7]

---

[4] Record, page 16.
[5] Record, page 16.
[6] Referring solely to *Moran Towing and Transportation Company v. Navigazione Libera Triestine, S.A.*, 92 F. 2d 37, 1937 A.M.C. 981.
[7] Record, page 47.

IV.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

Upon the basis of a misapplication of this court's decision in *Sun Oil Company v. Dalzell Towing Company*, 287 US 291, the Fourth Circuit permitted direct recovery by a stranger to the towing contract against the owner of an inert tow who had committed no act of negligence against the stranger but to the contrary had suffered the total loss of his own vessel through the joint negligence of the stranger and the tug. In so doing, the Fourth Circuit has extended the scope of the *Sun Oil Company* decision far beyond what was intended by this court to establish an entirely new concept of delictual responsibility, unsettling the law as to liabilities *in personam* to third parties of owners of vessels in tow, and contributing substantially to "the quandary in which the marine industry finds itself"[8] as to the validity and effect of towage contracts.

This court considered the liabilities of towed vessels to third persons in *Sturgis v. Boyer*, 24 Howard 110, and there held that an inert tow wholly under the direction and control of a towing vessel, when brought into collision with a third vessel "is no more responsible for the consequences . . . than so much freight," and that third persons suffering damage must look to the tug.[9] See also *The Eugene F. Moran*, 212 U.S. 466, and *Liverpool B. & R. P. Steam Navigation Company v. Brooklyn Terminals*, 251 U.S. 48. The Fourth Circuit's conclusion that the contract was valid and effective to change the rule of *Sturgis v. Boyer*, (which concededly would have required dismissal of the cross-libel) is in con-

[8] *Bisso, Jr., Receiver, et al. v. Inland Waterways Corp.*, (DC ED La. 1953), 114 F. Supp. 713, 714.

[9] 24 Howard 110, 122.

flict with the decisions of this court in *The Steamer Syracuse*, 79 U.S. 167, and *Compania de Navegacion Interior v. Firemen's Fund Insurance Co.*, (The WASH GRAY) (1928) 277 U.S. 66, and with decisions in other circuits interpreting and applying those cases.

In *The Syracuse*, where a tow libeled a towing vessel for damage sustained when brought into collision with a third vessel it was held, in spite of a contract provision reciting that the towage was at the risk of the towed vessel, that where the damage was the result of the negligence of the towing vessel, that vessel "must be visited with the consequences."[10] In *The Wash Gray*, an insurer defended suit by the owner of a towed vessel on the ground that under the provisions of its policy the insurer was discharged by reason of a release to the towing vessel and assumption of risk by the towed vessel contained in the towage contract. This court rejected the defense, holding that the provisions of the contract did not release the tug from liability for the negligence of its master and crew, and stating that "the rule laid down by this Court in *The Syracuse* covers the point."[11]

The latter decision was regarded[12] as resolving a conflict between the Second and Ninth Circuits on the question of the right of owners of towing vessels to contract against their own negligence,[13] in favor of the Ninth Circuit which had denied the right. But the subsequent decision of this court in *Sun Oil Co. v. Dalzell Towing Company*, seems to have resulted in further divergence of opinion among the circuits. In that case a tanker sued tugboat owners for

---

[10] 79 U. S. 167, 171.

[11] 277 U. S. 66, 73.

[12] Robinson on Admiralty, pages 670-672.

[13] *Mylroie v. British Columbia Mills Tug & Barge Co.*, (9th CA), 268 F. 449 (1920). Aff'd on other grounds, 259 U. S. 1; *The Occanica*, (2nd CA), 170 F. 893 (1909), cert. den. 215 U. S. 599.

damages incurred when the tanker went aground while being assisted by tugs. The tug owners defended on the basis of the following clause in the towing agreement:

> "When the captain of any tug engaged in the services of towing a vessel which is making use of her own propelling power goes on board said vessel, it is understood and agreed that said tugboat captain becomes the servant of the owners in respect to the giving of orders to any of the tugs engaged in the towage service and in respect to the handling of such vessel, and neither the tugs nor their owners or agents shall be liable for any damage resulting therefrom."

This court sustained the defense, observing that the tanker's master, officers and crew were at their stations and her propelling power and steering apparatus were in use, and said "It was not shown that respondent was to have or at any time did have control of the tanker or that it agreed or undertook to do more than to furnish tugs to assist her while using her own propelling power."[14] Noting that the services covered by the contract were "less than towage",[15] the court stated that the provision was nothing more than an expression of the well-established rule that "when one puts his employee at the disposal and under the direction of another for the performance of service for the latter, such employee while so engaged acts directly for and is to be deemed the employee of the latter and not of the former. . . ."[16]

Although this court was at pains to avoid any such inference, and the intention not to overrule *The Syracuse* and *The Wash Gray* seems clearly expressed, the Fifth Circuit, (as well as the Fourth), apparently interprets *Sun Oil Company v. Dalzell Towing Company* as requiring

[14] 287 U. S. 291, 293.
[15] 287 U. S. 291, 294.
[16] 287 U. S. 291, 295.

that provisions of towing contracts be given conclusive effect in every circumstance, having held in litigation between tug and tow that release and pilotage clauses were effective to relieve the tower of liability for negligent towage of a dumb barge.[17]

On the other hand, since the *Sun Oil Company* decision, the Ninth Circuit in *Hall Scott Motor Car Co. v. Universal Insurance Company*, (1941) 122 F. 2d 531, seems still to adhere to its decision in *Mylroie v. British Columbia Mills Tug and Barge Co.*, and the Sixth Circuit, in *Great Lakes Towing Company v. American SS Company* (1948) 165 F. 2d 368,[18] took the view that this court by affirming the Ninth Circuit's decision in *Mylroie v. British Columbia Mills Tug & Barge Co.*, "in effect, if not in phrasing" applied the principle of *The Syracuse*, saying that if compelled to decide the case upon the validity of the towage contract, "it might seem to us that decision must be controlled by the doctrine of *The Syracuse.*"[19] The District Court for the District of Delaware recently has concluded that past differences of opinion as to the effect of attempts to insulate against liability in towage situations "were settled in *The Wash Gray*";[20] and in the Southern District of New York, in *Petterson Lighterage Company v. Tug J. R. Russell*, (1949) 87 F. Supp. 467, it was held that, except in the "special case" which arises in the limited situation presented in the *Sun Oil Company* case, *The Wash Gray* still requires "a general release or exemption running to the tower" to be held void,[21] a conclusion supported by the

---

[17] *Bisso, Jr., Receiver, et al. v. Inland Waterways Corp.*, see footnote 1, supra.

[18] Cited by the Fourth Circuit in the case at bar as upholding "the validity of an analagous provision".

[19] 165 Fed. 2d 368, 371.

[20] *Texas Company v. Lea River Lines, Inc.*, 109 F. Supp. 266, 267; reversed on other grounds, (3rd CA), 206 F. 2d 55.

[21] 87 F. Supp. 467, 470.

opinion of Professor Robinson. *Robinson on Admiralty*, 1939, pp. 670-673. Thus, on the question of validity of release and pilotage clauses there is conflict between the Fourth and Fifth Circuits on the one hand, and the Sixth and Ninth Circuits and the Southern District of New York and the District of Delaware on the other.

In addition, the Fourth Circuit's decision is in conflict with decisions of the Third Circuit and the Court of Appeals of New York, which without specifically invalidating the pilotage clause, denied it effect in fixing liabilities of tug and tow to third parties.

In *Publicker Industries, Inc. v. Tugboat Neptune Company and Tugboat Triton Company* (WILLAM J. WORTH) (3rd CA) 171 F. 2d 48, (1949) both tug and tow were sued by owners of a dock damaged by the steamer through negligence of a tugmaster directing undocking operations from aboard the steamer. The court of appeals (having in earlier proceedings[22] vacated a decree entered by the District Court of the Eastern District of Pennsylvania against the vessel owner) affirmed the district court's decree imposing sole liability on the tugs. As to the tug owners' contention that the standard form of pilotage clause[23] absolved them from liability, the Third Circuit said that "even if we assume that the tugboat companies were entitled to the benefit of the pilotage clause" as between themselves and the owners of the steamer, inasmuch as the plaintiff was not a party to the contract, the clause

---

[22] 165 F. 2d 1002.

[23] "Whenever the Master or other officer of any tug or any licensed pilot goes on board a vessel to assist her movement or handling, he becomes and continues to be solely the servant of said vessel and her owners in respect of all acts done by him and all orders given by him to any tugs engaged or to said vessel or otherwise in the movement or handling of said vessel; and none of the tugs or their owners, agents or charterers shall be responsible or liable for any claims or any damages caused by or resulting form such acts or orders."

"was not conclusive" in determining whether the captain of the tug was in control of the operation or was acting under the orders of the captain of the steamer. Thus, the court said, "while it was proper for the (district) court to consider the clause in determining (this) actual fact," it was "not error for the court from the other evidence in the case to find the actual fact to be that (the tug captain) acted throughout as employee and agent of the tugboat company."[24]

In *Patterson Oil, Inc. v. Tug Port Covington*, (DCED Pa.) 109 F. Supp. 953, (1953) wherein libelant's mooring dolphin was damaged as a result of the negligence of both tug and tow, and both were sued, the District Court for the Eastern District of Pennsylvania declined to consider the effect of the pilotage clause which the tug owner contended made the vessel owner solely liable. The district court said "the pilotage clause by which the docking pilot became the servant of the vessel and her owners does not affect the tort liabilities of the parties to the libelant, whatever its effect may be as between the two parties to the contract."[25] The court of appeals, affirming, said ". . . the district court refused and properly so, to adjudicate with reference to questions related to the operation of the pilotage clause."[26]

Robins Drydock & Repair Co. v. Navigazione Libera Triestine, S.A. and Moran Towing & Transportation Company, Inc. (BRENTA II) 154 N. Y. Misc. 788, aff'd. 261 N. Y. 455, cert. den. 290 U. S. 656, was another case of damage to a dock in which the dock owner sued both tug and tow. Negligence of the tugmaster who was aboard the steamer

[24] 171 F. 2d 48, 50, 51.
[25] 109 F. Supp. 953, 955.
[26] *Patterson Oil, Inc. v. Tug Port Covington*, (3rd CA), 205 F. 2d 691, 693.

was established and tug owners contended that the ship was solely responsible to the dock owner because under the pilotage clause the tugmaster became the servant of the ship. The trial court said that the liabilities of tug and tow as to persons not parties to the contract "must be measured by the actual relation of" each of them to the individual causing the damage, and the relationship "must be determined by all the facts surrounding (his) employment. It is by no means conclusively established by what the parties in the pilotage clause declared those relations to be . . . the language of the parties could not have been made strong enough to change the essential character of the relation by any change of name." Applying this test, the trial court found that "Control and direction and the choice of methods rested exclusively with (the Tugmaster) as the representative of the towing company",[27] and held the tug solely responsible, exonerating the steamer. In affirming, the Court of Appeals of New York, citing *Sturgis v. Boyer*, pointed out that in performing the maneuver involved, the general rule is that the tower acts as an independent contractor and is primarily liable for negligent injuries; and that except for the so called "pilotage clause" the general rule would apply. But the court said ". . . as such, it has no validity as to third persons . . . something more, however, is claimed for it. Because it says that the 'tugboat captain becomes the servant of the owners . . . in respect to the handling of such vessel,' it is argued that such was in fact (his) relation to the ship's owner, even when considered in the light of the surrounding facts and circumstances. We do not understand appellant to argue that in and of itself the clause was conclusive on plaintiff. That, of course, would not be so. . . . The question became one of fact and was so determined below; nor did the Court in

[27] 154 N. Y. Misc. 788, 794, 795.

considering the question, lose sight of the contract itself, as appellant asserts. The description which the parties gave to their own relation was weighed against the facts, and the facts were found not to justify that description."[28]

William J. Worth and *Brenta II* were deemed not applicable in the present case, because the Fourth Circuit said it was not called upon to decide whether the owner of a tug may ever escape liability to a third party by reason of the contract, but only whether liability of the owner of the tow to third parties may be based on such an agreement.[29] In both of those cases, however, in the face of a contention that the towing contract made it solely responsible, the towed vessel was completely exonerated on the grounds that in determining liabilities of towed vessels to third parties the contract was either ineffective or insufficient as evidence of the actual relationship between the owner of the tow and the tugmaster to overcome other proof. Because petitioners themselves committed no tortious act as to the WINDING GULF, the underlying question here, to the same extent as in the *William J. Worth* and *Brenta II*, was one of agency of the tugmaster, and the application of the reasoning of the Third Circuit and of the New York Court of Appeals to the facts of this case must necessarily have produced a different result.[30] By the same token, the reasoning of the Fourth Circuit would seem rather plainly to have required exoneration of the towing company, had it been in the case, contrary to the result reached in the *William J. Worth* and *Brenta II*, and in spite

[28] 261 N. Y. 455, 462, 463.

[29] Record, page 47.

[30] It was never contended in this case that there was any fact (except the language of the towing contract alone) which would remotely suggest that the tugmaster was not in reality acting as agent and servant of the towing company.

of the court's disclaimer that it was adjudicating the right of the tug to escape liability.

Finally, the decision of the court of appeals seeming to give effect to the contract as a contract of indemnity and to permit its direct enforcement against petitioner as indemnitor by the owners of the WINDING GULF, who were strangers to it,[31] is in direct conflict with decisions of this Court and the Third Circuit. In *Robins Drydock & Repair Co. v. Flint* (1927) 275 U.S. 303, this court refused to permit recovery by time charterers of a steamship against a drydock company for loss of use of the steamer delayed in drydock because damaged while there through the negligence of drydock employees, the libel having been brought upon the apparent theory that the contract for drydocking between the drydock company and the owners was made for the charterer's benefit and was incidental to the charter party. Justice Holmes said ". . . it is plain, as stated by the circuit court of appeals, that the libelants, respondents here, were not parties to that contract 'or in any respect beneficiaries', and were not entitled to sue for a breach of it 'even under the most liberal rules that permit third parties to sue on a contract made for their benefit.' 13 F. 2d 4. Before a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement, to which he

---

[31] This conclusion appears to have been arrived at upon the court's own initiative. No such argument was made to it, and no such claim is apparent from the pleadings. To the contrary, cross-libelants repeatedly disclaimed any intention to rely "on the contract qua contract". The question therefore was never discussed, either in the district court or on brief or in argument in the court of appeals. After the decision, petitioner suggested in petition for rehearing to the court of appeals that an opportunity be afforded to brief and argue the matter, but the court denied the petition without opinion. To the extent the order denying rehearing imported an opinion that the result would not be changed upon proof of inequality of bargaining power, the case is also in direct conflict with *Sun Oil Co. v. Dalzell Towing Co.*, 287 U. S. 291, 294.

is not a party, he must at least show that it was intended for his direct benefit.' *German Alliance Ins. Co. v. Home Water Supply Co.*, 226 U.S. 220, 57 L. ed. 195, 199, 42 L.R.A. (N.S.) 1000, 33 Sup. Ct. Rep. 32 . . . the contract of the petitioner with the owners imposed no immediate obligation upon the petitioner to third parties as we already have said, and whether the petitioner performed it promptly or with negligent delay was the business of the owners and of nobody else."[32]

Since *Robins Drydock & Repair Co. v. Flint*, the theory of liability on the cross-libel adopted by the Fourth Circuit seems seldom, if ever, to have been invoked in admiralty. However, the Third Circuit, in *Isbrandtsen Company v. Local 1291 of International Longshoreman's Association* (1953) 204 F. 2d 495, denied the right of time charterers of a vessel to sue a longshoremen's union for damages caused by delay in unloading, due to a work stoppage contrary to the provisions of a contract between the union and a marine trade association, on the ground that the charterer (not a party to the contract) was neither a "donee" nor a "creditor" beneficiary but, at best, only an "incidental" beneficiary.[33] It was thought perhaps an arguable question whether the claim was based upon any federal authority or whether state law would apply by virtue of diversity of citizenship, but the court concluded that the question need not be resolved, because "We think that *Robins Drydock & Repair Company v. Flint* shows clearly that there could be no recovery under federal authority, and the same thing is true under Pennsylvania decisions."[34]

---

[32] 275 U. S. 303, 307, 308.

[33] The court employed the classification of beneficiaries as used in Restatement of Contracts, §§133-147.

[34] 204 F. 2d 495, 499.

CONCLUSION

The validity and effect of release provisions and pilotage clauses in towing contracts generally is a matter of paramount importance to the shipping industry, because the use of such provisions has become widespread if not universal. In particular, the extension in the present case of the applicability of such provisions for the first time to impose direct liability on the owner of an inert tow to a stranger to the contract, if permitted to stand, will have far-reaching consequences touching and unsettling many aspects of the admiralty law. The case thus presents this court with an opportunity to define the effect of such provisions in a situation graphically illustrating the need for such definition.

The writ of certiorari prayed for should be granted and the decision of the Court of Appeals for the Fourth Circuit reversed.

Respectfully submitted,

JOHN H. SKEEN, JR.,
WILLIAM A. SKEEN,
EUGENE M. FEINBLATT,
Proctors for Petitioners.

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
JAN 6 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 70

BOSTON METALS COMPANY, FORMERLY NAMED BOSTON IRON AND METAL COMPANY, AS OWNER OF THE CANADIAN DESTROYER "ST. FRANCIS",

Petitioner,

VS.

S/S "WINDING GULF"

AND

MASSACHUSETTS TRUSTEES OF EASTERN GAS AND FUEL ASSOCIATES,

Respondents.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONER

JOHN H. SKEEN, JR.,
WILLIAM A. SKEEN,
EUGENE M. FEINBLATT,
Proctors for Petitioner.

The Daily Record Co., Baltimore 3, Md.

INDEX

Table of Contents

	PAGE
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statement of the Case	2
Summary of Argument	8
Argument:	
A. The Standard Towing Conditions are invalid as an attempt by a tower of an unmanned vessel to stipulate against liability for his own negligence	9
B. The Contract Containing the Standard Towing Conditions, Whether or not Valid as Between the Parties, is not Effective to Alter Liabilities of the Owners of Either the Tug or the Tow to Third Parties	14
1. *The Contract as Making the Tugmaster Petitioner's Agent as to Third Parties*	14
2. *Direct Enforcement of the Contract Against Petitioner as Indemnitor*	23
Conclusion	27

Table of Authorities

Cases

Adams v. The Peter Moran, 94 F. Supp. 520	3
Alaska Commercial Co. v. Williams, 128 F. 362 (CA 9, 1904)	11

PAGE

Bisso No. 9, The — William A. Bisso, Jr., Receiver, et al. v. Inland Waterways Corporation, 114 F. Supp. 713, 1953 A.M.C. 1661, 211 F. 2d 401, 1954 A.M.C. 648, No. 50, October Term, Supreme Court of U. S. 9, 14

Central States Grain Co-op. v. Nashville W. & E. Corp., 48 F. 2d 138, (CA 7, 1931) 27

Commercial Insurance Co. v. Ives, 46 Ill. 402 23

Compania de Navegacion v. Firemen's Fund Insurance Co., 277 U.S. 66 (The Wash Gray) 11, 13

Eugene F. Moran, The, 212 U.S. 466 9

German Alliance Ins. Co. v. Home Water Supply Co., 226 U.S. 220 26

Great Lakes Towing Company v. American Steamship Company, 165 F. 2d 368 (CA 6, 1948) cert. den. 333 U.S. 881 13

Great Lakes Towing Company v. Bethlehem Transportation Company, 65 F. 2d 543 (CA 6, 1933) 13

Gubelman, In re, 13 F. 2d 730, (CA 2, 1926) 26

Hall-Scott Motor Car Company v. Universal Insurance Company, 122 F. 2d 531 (CA 9, 1941) cert. den. 314 U.S. 690 13

Helen, The, 5 F. 2d 54, (CA 2) 21

Isbrandtsen Company v. Local 1291 of International Longshoreman's Association, 204 F. 2d 495 (CA 3, 1953) 26, 27

Jonty Jenks, The, 54 F. 1021 (N.D. N.Y. 1893) 11

Liverpool B. & R. P. Steam Navigation Company v. Brooklyn Terminals, 251 U.S. 48 9

Logue Stevedoring Co. v. Dalzellance, etc., 98 F. Supp. 276 (D.C. S.D. N.Y., 1951) 25

Logue Stevedoring Company v. Dalzellance, etc., 198 F. 2d 369 (CA 2, 1952) 19, 21

Margaret, The, 94 U.S. 494 (1876) 14

Moran, In re, 120 F. 556 (E.D. N.Y., 1903) 11

PAGE

Moran Towing and Transportation Company v. Navigazione Libera Triestine, S. A., 92 F. 2d 37, (CA 2, 1937) cert. den. 302 U.S. 744 ..... 7, 19, 24

Mylroie v. B. C. Mills Tug and Barge Company, 268 F. 449 (CA 9, 1920) 11

Oceanica, The, 170 F. 893, (CA 2, 1909) 11

Patterson Oil, Inc. v. Tug Port Covington, 109 F. Supp. 953 (E.D. Pa., 1953), aff'd. 205 F. 2d 694 (CA 3, 1953) 20, 21

Petterson Lighterage Co. v. Tug J. R. Russel, 87 F. Supp. 467 (S.D. N.Y., 1949) 13

Publicker Industries, Inc. v. Tugboat Neptune Co. & Tugboat Triton Co., 165 F. 2d 1002 (CA 3, 1948) 19

Publicker Industries, Inc. v. Tugboat Neptune Company and Tugboat Triton Company (William J. Worth), 171 F. 2d 48 (CA 3, 1949) 19, 20, 21, 22

Robins Drydock and Repair Company v. Flint, 275 U.S. 303 (1927) 25, 26, 27

Robins Drydock & Repair Co. v. Navigazione Libera Triestina, S.A. and Moran Towing & Transportation Company, Inc. (Brenta II) 154 N.Y. Misc. 788 (1931) aff'd. 261 N.Y. 455 (1933), cert. den. 290 U.S. 656 ..... 10, 16-19, 21, 22

Sea Lion, The, 12 F. 2d 124, 1926 A.M.C. 265 11

Somers N. Smith, The, 120 F. 569 (D.C. Me., 1903) 11

Stevens v. The White City, 285 U.S. 195 (1932) 14

Sturgis v. Boyer, 24 How. (65 U.S.) 110 ..... 8, 9, 14, 15, 16, 18, 19, 21, 22

Sun Oil Co. v. Dalzell Towing Co., 55 F. 2d 63, (CA 2, 1932) 12

Sun Oil Co. v. Dalzell Towing Co., 287 U. S. 291 (1932) 7, 12, 13, 14, 15, 16

Syracuse, The, 12 Wall. (79 U.S.) 167 (1870) 10, 13, 14

Texas Company v. Lea River Lines, Inc., 109 F. Supp. 266, 267 (D.C. Del., 1953) reversed (206 F. 2d 55, (CA 3, 1953) 14

PAGE

Webb, The, 14 Wall. (81 U.S.) 406 (1871) 14

Winters, Martin, etc. v. Tug H. C. Jefferson, 69 F. Supp. 650 (E.D. Pa. 1946) 19

Miscellaneous

28 Cornell L.Q. 194 (1943) 13

Griffin on Collision 11, 16

Restatement of Contracts, pp. 133-147 26

Robinson, Handbook of Admiralty Law (1939) 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 70

BOSTON METALS COMPANY, FORMERLY NAMED BOSTON IRON AND METAL COMPANY, AS OWNER OF THE CANADIAN DESTROYER "ST. FRANCIS",

Petitioner,

VS.

S/S "WINDING GULF"

AND

MASSACHUSETTS TRUSTEES OF EASTERN GAS AND FUEL ASSOCIATES,

Respondents.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the district court on liability[1] was rendered on June 10, 1947 and is reported in 72 F. Supp. 50, 1947 A.M.C. 819. The district court's opinion on damages[2] was rendered on March 22, 1949 and is reported in 85 F. Supp.

[1] Record, page 1.
[2] Record, page 42.

806, 1949 A.M.C. 1149. The opinion of the court of appeals[1] was rendered on January 4, 1954 and is reported in 209 F. 2d 410, 1954 A.M.C. 183.

JURISDICTION

Jurisdiction of this court was invoked by petition for writ of certiorari filed May 10, 1954, under 28 U.S.C. 1254. Certiorari was granted on October 14, 1954, ... U.S. ..., 99 L. ed. (Advance p. 25).

QUESTION PRESENTED

When an inert tow, wholly under the direction and control of a towing vessel, is brought into collision with a third vessel and sunk through negligence of the master of the tug, may the owner of the tow be held directly liable *in personam* to the owner of the third vessel for damage to the third vessel, solely by reason of a contract between the owners of the tug and tow, (to which the owner of the third vessel was a stranger) providing that all towing is done at the sole risk of the tow, that the owner of the tow will indemnify the owner of the tug for damages to third vessels and containing a provision declaring the master of the tug to be the agent and servant of the owner of the tow?

STATEMENT OF THE CASE

This is a suit in admiralty instituted by petitioner against the steam collier WINDING GULF, *in rem*, and her owners, *in personam*, to recover for loss of petitioner's vessel, Destroyer I-24, (otherwise known as the ST. FRANCIS), which was sunk as a result of a collision with the WINDING GULF, occurring while the I-24 was an inert tow, unmanned and without motive power, wholly under the direction and control of the tug PETER MORAN. Since jurisdiction could

[1] Record, page 57.

not be obtained over the tug or its owners in the District of Maryland, the tug was not before the court.[4] The WINDING GULF was damaged in the collision, and her owners filed a cross-libel *in personam* against petitioner.

The I-24 was one of two obsolete Canadian destroyers, purchased by petitioner to be converted to scrap. They were to be towed as "dead" ships, i.e. without motive power and with rudders secured amidships, from Sydney, Nova Scotia to Baltimore by Foundation Maritime Ltd., a large Canadian Towing Company. By letter dated at Halifax, N.S., July 3d, 1945, Foundation Maritime Ltd. advised petitioner:

> "We confirm our telegram to you of yesterday and your reply wherein it is agreed that we will supply tug for the towage of two former Canadian Navy Destroyers ('St. Francis' and 'Hamilton') from Sydney, N.S. to Baltimore, Md. for the sum of Eleven Thousand Dollars ($11,000.00) U.S. Funds.
>
> "It is understood that these vessels are now ready at Sydney and that you have arranged to have them placed in seaworthy condition with all watertight doors closed and rudders secured amidships.
>
> "It is further understood that these two vessels will be taken as a double tow, that is the two vessels in tow of the one tug. It is further understood and agreed that our services will be supplied in accordance with the Standard Towing Conditions attached hereto and forming part hereof.
>
> * * * * * *
>
> "We shall also be entitled to engage an American towing company to supply tug service for part of the voyage in American waters and the services of any tug so supplied shall be considered as supplied under

[4] Owners of WINDING GULF sued the tug and owners in the Southern District of New York which resulted in a decision of both at fault and a decree dividing damages. *Adams v. The Peter Moran*, 94 F. Supp. 730.

the above mentioned terms and conditions. We or our sub-contractors will supply the necessary personnel for handling the vessels through the Cape Cod Canal.

* * * * * *

"Your acceptance of this letter will constitute a contract between us."

The attached Standard Towing Conditions[*] included the following clauses:

* * * * * *

"Tug services will be supplied upon the condition that all towing, moving, shifting, docking, undocking or other handling of a vessel or craft of any character by a tug or tugs owned or employed by the Tug Company is done at the sole risk of such vessel or craft and of the owners, charterers or operators thereof, and that the Master and crew of such tug or tugs used in the said services become the servants of and identified with such vessel or craft and their owners, and that the Tug Company only undertakes to provide motive power.

"The Tug Company will not be responsible for the acts or defaults of the Master, or crew of such tug or tugs, or any of their servants or agents or else whosoever, nor for any damages, injuries, losses or delays from whatsoever cause arising that may occur either to such vessel or craft, or property or persons on board thereof, or to any other ship or vessel or property of any kind whether fixed or movable and the Company shall be held harmless and indemnified by the Hirer against all such damages, injuries, losses and delays, and against all claims in respect thereof.

"Such exemption from liability shall apply regardless of whether such vessel or craft assists in the services with its own steam or power or in any other way, and irrespective of whether any employee of the Tug

[*] The letter and Standard Towing Conditions are reproduced in full, Record, pages 21-24.

Company or the Master, or any of the crew of such tug or tugs is at the time of said services on board of such vessel or craft, or in command thereof.

"The foregoing conditions shall apply to any damages, injuries, or loss from whatsoever cause arising that may occur to the vessel or craft requiring the tug or tugs or to any other vessel or craft, or to any person or property on board thereof, or to any other property whether fixed or movable, while such tug or tugs is or are in attendance upon or fast to or engaged in any maneuver for the purpose of making fast to, or disengaging from or proceeding clear from the vessel or craft requiring the tug or tugs, provided however that the said conditions shall not apply to loss or damage to the tug or tugs or to property on board the tug or tugs or to damages for personal injuries to or loss of life of members of the crews of the tug or tugs or persons on board thereof, unless such loss or damage or such damages for personal injuries or loss of life shall have been caused or contributed to by the fault or negligence of the vessel or craft requiring the tug or tugs."

Foundation Maritime Ltd. had arranged with Moran Towing Company to take over the tow at the east end of the Cape Cod Canal to complete the voyage to Baltimore. Petitioner was not a party to this arrangement.

The master of the Foundation Maritime tug, testifying by deposition, identified himself as an employee of Foundation Maritime and said he knew nothing about arrangements between petitioner and Foundation Maritime.[6] He said that he took his tug to Sydney, arriving at 5:10 A.M., on July 3d, 1945, immediately located the destroyers in Sydney harbor, and made fast alongside of them. He found them, as expected, with no crews aboard and without motive power.[7] The tug's crew went aboard the destroyers and

[6] Record, pages 24, 34.
[7] Record, page 26.

placed the tug's own gear aboard them and, under the supervision of the tug master, made other extensive preparations for the voyage.[8] As the destroyers had no electric power, lights were supplied and set in place by the tug, and the master inspected the work and declared himself satisfied that the destroyers were in fit condition to be towed.[9] They were then taken in tow, in tandem on the tug's hawsers, and the flotilla proceeded to the Cape Cod Canal. It was there met by the Tug PETER MORAN, a 1,000 ton diesel electric tug carrying a crew of 15 men. The master of the Moran tug identified himself as an employee of Moran Towing Company and testified, as had the master of the Foundation Maritime tug, that he knew nothing about arrangements between his company and the owner of the destroyers.[10] He found no crews aboard the destroyers, and stated that he had not expected to find any.[11] The PETER MORAN took the destroyers alongside through the canal, and, while traversing the canal, her master boarded and inspected both of them. After passing through, the tow was again made up in tandem, and while being so towed in the vicinity of Hen and Chickens lightship, the I-24 was brought into collision with the WINDING GULF. As noted in the district court's opinion, of the total crew of 15 aboard the PETER MORAN, only the master and a deckhand were on deck at the time of collision.[12]

The district court found that the collision was the result of negligence of both the WINDING GULF and the master of the tug and, by imputing the fault of the master of the tug to the owner of the tow, held petitioner liable on the cross-libel and entered a decree dividing damages

---

[8] Record, pages 26-29.
[9] Record, pages 33, 29.
[10] Record, pages 35, 39-40.
[11] Record, pages 38, 41.
[12] Record, page 5.

The court held that the master of the tug "by the terms of the contract became" the servant of the owners of the tow, that the provisions of the contract thus legally resulted in making his faults directly attributable to the owner of the tow, and that "these faults may be ascertained in this case without the circuity of action due to their first being litigated in a suit by the WINDING GULF against the tug."[13]

Petitioner appealed from the finding of liability on the cross-libel. There was no cross-appeal from the district court's finding of negligence on the part of the WINDING GULF.

In affirming, the court of appeals said the case was "governed" by *Sun Oil Co. v. Dalzell Towing Co.*, 287 U.S. 291,[14] but did not specifically approve or disapprove the district court's conclusion that the contract made the tugmaster petitioner's servant. Instead, although the district court had assumed that "no question of indemnity arising under the contract" could be litigated in the case,[15] the court of appeals, after noting that such a contract of indemnity had been "enforced" in a suit against the owner of a tow by the owner of a tug which had been compelled to pay damages to an injured third party,[16] said it saw "no reason why it should not be given effect in a suit by an injured third party against the owner of the tow * * *"[17]

---

[13] Record, page 13.
[14] Record, page 61.
[15] Record, page 13.
[16] Referring solely to *Moran Towing and Transportation Company v. Navigazione Libera Triestine, S.A.*, 92 F. 2d 37, 1937 A.M.C. 981.
[17] Record, page 63.

SUMMARY OF ARGUMENT

Dismissal of the cross-libel is required by *Sturgis v. Boyer*,[18] in which this Court held that an inert tow, wholly under the direction and control of the master and crew of a towing vessel, is no more responsible to third persons for the consequences of collision brought about by the fault of the master of the tug "than so much freight."

The applicability of the rule of *Sturgis v. Boyer* is not affected by the "standard towing conditions" in the contract between the owner of the tug and the owner of the tow; because,

(a) as an attempt by a tower of an unmanned vessel to stipulate against liability for his own negligence, the standard towing conditions are invalid; and

(b) whether valid or not, (1) the provision therein declaring that the master and crew of the tug are the agents and servants of the owner of the tow is not conclusive on the factual question of agency of the master of the tug so as to give to a third person a direct right of action against the owner of the tow; and such provision is not sufficient to overcome all other circumstances of this case establishing that at the time of collision, the master and crew of the tug were, in fact, the agents and servants of the towing company; and (2) the agreement to indemnify the towing company cannot be directly enforced against petitioner by respondents here, who were strangers to it.

---

[18] 24 How. (65 U.S.) 110.

ARGUMENT

A. The Standard Towing Conditions are invalid as an attempt by a tower of an unmanned vessel to stipulate against liability for his own negligence.[19]

This court in 1860 carefully considered the liabilities of towed vessels to third persons in *Sturgis v. Boyer*,[20] and there held

> "* * * whenever the tug, under the charge of her own master and crew, and in the usual and ordinary course of such an employment, undertakes to transport another vessel, which, for the time being, has neither her master nor crew on board, from one point to another, over waters where such accessory motive power is necessary or usually employed, she must be held responsible for the proper navigation of both vessels; and third persons suffering damage through the fault of those in charge of the vessels must, under such circumstances, look to the tug, her master or owners, for the recompense which they are entitled to claim for any injuries that vessels or cargo may receive by such means. Assuming that the tug is a suitable vessel, properly manned and equipped for the undertaking, so that no degree of negligence can attach to the owners of the tow, on the ground that the motive power employed by them was in an unseaworthy condition, and the tow, under the circumstances supposed, is no more responsible for the consequences of a collision than so much freight; * * *"[21]

Application of this principle would have permitted full recovery by petitioner and required dismissal of the cross-

---

[19] This proposition is persuasively presented in brief for petitioners in the companion case to this, *The Bisso No. 3 — William A. Bisso, Jr., Receiver, et al. v. Inland Waterways Corporation*, No. 50, October Term, 1954, now pending in this Court. A decision in favor of petitioners therein would seem necessarily to require reversal of the decisions below in this case.

[20] 24 How. (65 U.S.) 110; See also *The Eugene F. Moran*, 212 U.S. 466 (1909); and *Liverpool B. & R. P. Steam Navigation Company v. Brooklyn Terminals*, 251 U.S. 48 (1919).

[21] 24 How. (65 U.S.) 110, 122.

libel in this case.[22 & 23] And, as the contract was invalid, it was not effective to prevent its application.

In 1870 in *The Syracuse*[24] when a tow libelled a towing vessel for damage sustained when brought into collision with a third vessel, the owner of the tow-boat defended on the basis of a contract provision reciting that the towage was at the risk of master and owners of the tow. This Court said that "the policy of the law" requires the exercise of reasonable care, caution and maritime skill on the part of those engaged in the management of the towing boat, and if disaster occurs as a result of the neglect of these, "the towing boat must be visited with the consequences;" that "* * * if it be true, * * * that, by special agreement, the canal-boat was being towed at her own risk, nevertheless, the steamer is liable, if, through the negligence of those in charge of her, the canal-boat has suffered loss;"[25] and that towers "must see that the large amount of property intrusted to their care is not placed in jeopardy, through the want of preliminary caution and foresight on the part of the officers of their steamers."[26]

Since *The Syracuse* decision, lower admiralty courts generally seem to have considered it settled that a tug could not by contract exonerate itself from liability for its own

---

[22] Court of Appeals for the Fourth Circuit decision herein, Record p. 61; *Robins Drydock & Repair Co. v. Navigazione Libera Triestina, S.A.*, and *Moran Towing & Transportation Company, Inc.*, (Brenta II), 154 N.Y. Misc. 788, 1931 A.M.C. 1741, aff'd. 261 N.Y. 455, 1933 A.M.C. 700 cert. den. 290 U.S. 656.

[23] Robinson, *Handbook of Admiralty Law* (1939), p. 679, etc.; Griffin on *Collision* (1949), Par. 245, p. 559.

[24] 12 Wall. (79 U.S.) 167.

[25] 12 Wall. (79 U.S.) 167, 171. This language does not seem to be open to an interpretation that the court refused to give effect to the release clause because it was insufficiently specific. The court seems to have been willing to assume that the agreement could have been couched in language of the utmost clarity without changing the result.

[26] 12 Wall. (79 U.S.) 167, 173. A policy intended to insure preliminary caution and foresight on the part of those in control of the towboat is particularly appropriate in towage of "dead" ships.

negligence.[27] Although the Second Circuit in 1909 decided in favor of the validity of such a release,[28] this court denied certiorari,[29] and later, in 1920, affirmed[30] *Mylroie v. B. C. Mills Tug and Barge Company*, in which the Ninth Circuit had held a tug "* * * not allowed by law to avoid by contract the consequences of its own negligence."[31] Again in 1928, *Compania de Navegacion v. Firemen's Fund Insurance Co.*, (The Wash Gray),[32] this Court took occasion to confirm the doctrine of *The Syracuse*. There, an insurer defended suit by the owner of a towed vessel on the ground that under the provisions of its policy the insurer was discharged by reason of a release to the towing vessel and assumption of risk by the towed vessel contained in the towage contract. The provisions of the contract were held not to release the tug from liability for the negligence of its master and crew, and it was said that "the rule laid down by this court in *The Syracuse* covers the point."[33]

---

[27] *Alaska Commercial Co. v. Williams*, 128 F. 362, 366 (C.A. 9, 1904); *The Jonty Jenks*, 54 Fed. 1021 (N.D. N.Y., 1893); *In Re Moran*, 120 Fed. 556 (E.D. N.Y., 1903); *The Somers N. Smith*, 120 Fed. 569 (D.C. Me., 1903); *The Sea Lion*, 12 Fed. 2d 124, 1926 A.M.C. 265; and see Griffin on *Collision*, p. 463.

[28] *The Occanica*, 170 F. 893 (C.A. 2, 1909). The majority recognized that its decision was a "departure from previous decisions". Judge Coxe dissented, stating: "It ought to be against public policy to permit a vessel to contract against her own fault. To allow her to do so begets recklessness, carelessness and neglect. The same reasons for prohibiting such a contract in the case of common carriers apply, though not, perhaps, to the same extent, in the case of a towage contract. In both cases the design is to prevent those who have the absolute control of another's property from extorting an agreement that they may neglect all reasonable precautions to preserve it."

[29] 215 U.S. 599.

[30] 259 U.S. 1. Although this Court found it unnecessary to consider whether the exemption clause was void, the Sixth Circuit, in *Great Lakes Towing Co. v. American S.S. Co.*, 165 F. 2d 368, as recently as 1948, regarded the affirmance as "in effect if not in phrasing" applying the doctrine of *The Syracuse*, and as a precedent which probably would require the invalidating of a contract provision declaring the master and crew of the tug to be the servants and agents of the owners of the tow.

[31] 268 F. 449.

[32] 277 U.S. 66.

[33] 277 U.S. 66, 73.

Nothing in this Court's subsequent decision in *Sun Oil Company v. Dalzell Towing Company*[34] makes the doctrine of *The Syracuse* inapplicable to the towage of a "dead" ship. There, this Court affirmed the Second Circuit,[35] which had enforced a clause declaring the master and crew of the tug to be the agents and servants of the owners of tow, in a case where the tow was damaged through the negligence of one of the tugmaster's who was on board acting as docking pilot. Observing that the tanker's "master, officers and crew were at their stations and her propelling power and steering apparatus were used," this Court said "It was not shown that respondent was to have or at any time did have control of the tanker or that it agreed or undertook to do more than to furnish tugs to assist her while using her own propelling power.[36] Noting that the services covered by the contract were "less than towage",[37] it was then said that the provision was nothing more than an expression of the well-established rule that "when one puts his employee at the disposal and under the direction of another for the performance of service for the latter, such employee while so engaged acts directly for and is to be deemed the employee of the latter and not of the former * * *"[38]

The *Sun Oil Company* decision is not a far-reaching one. It was not intended to and did not overrule *The Syracuse*, and does not impair the force of that decision as an expression of policy applicable to a towage situation, particularly of a "dead" vessel. The broad validating of all towage contracts in all situations was wholly unnecessary to the results. The decision does not rest exclusively, or even prin-

[34] 287 U.S. 291.
[35] 55 Fed. 2d 63. The court of appeals laid great emphasis upon the difference between pilotage and "dead" towage.
[36] 287 U.S. 291, 293.
[37] 287 U.S. 291, 294.
[38] 287 U.S. 291, 295.

cipally, on the language of the contract. To the contrary, it rests principally on an application of the doctrine of "loaned servant" to a situation so peculiarly appropriate that the result should have been the same without the contract.[39]

Since the *Sun Oil* decision, *The Syracuse* and *The Wash Gray* have continued to be interpreted and applied as prohibiting a tug from contracting against its own negligence,[40] and where the effect of *Sun Oil* has been discussed, the tendency has been to strictly limit it to situations where the tow is under power, and her master and crew are on board and actually in control.

For example, in 1948 the Sixth Circuit held the *Sun Oil* case inapplicable where the master of the tug was not upon the assisted ship, having indicated that, if necessary to its decision, it would on authority of *The Syracuse* hold invalid the provision declaring the master and crew of the tug to be the agents and servants of the tow;[41] the Southern District of New York held in 1949 that, except in the "special case" presented in the *Sun Oil Company* situation, the *Wash Gray* still requires "a general release or exemption running to the tower" to be held void;[42] and the District Court, for the District of Delaware, in 1953, concluded that

---

[39] See point B of this brief comparing *Sturgis v. Boyer*, supra, in which, it is submitted, the presence of a contract declaring master and crew of the tug the agents and servants of the owner of the tow, even if valid, would not have altered the result.

[40] Professor Robinson, writing after the *Sun Oil* case, says that as a result of the *Wash Gray* decision, "* * * it seems to be settled that the contract exempting the tug from its negligence is not valid." Robinson, *Handbook of Admiralty Law* (1939), p. 672; See 28 Cornell L.Q. 194, 195 (1943), in which it is commented that "If it be intimated that *Sun Oil Company v. Dalzell Towing Company, Inc.*, may have modified the other two cases (*The Syracuse* and *The Wash Gray*), it is submitted, however, that the last case stands alone on its peculiar facts." And see also *Hall Scott Motor Car Company v. Universal Insurance Company*, 122 F. 2d 531 (C.A. 9, 1941); cert. den. 314 U.S. 680.

[41] *Great Lakes Towing Company v. American Steamship Company*, 165 F. 2d 368, cert. den. 333 U.S. 881. See also *Great Lakes Towing Company v. Bethlehem Transportation Company*, 65 F. 2d 543. (C.A. 6, 1933).

[42] *Petterson Lighterage Company v. Tug J. R. Russell*, 87 F. Supp. 467, 470.

past differences of opinion as to the effect of attempts to insulate against liability "were settled in the *Wash Gray*."[43]

By its emphasis in the *Sun Oil* case on the presence of elements of direction and control, this Court clearly indicated its intention to leave undisturbed the rule of *Sturgis v. Boyer* as applicable to towage of unmanned vessels. That intention is confirmed by the careful maintenance of the distinction between towage of unmanned and manned vessels in *Stevens v. The White City*[44] and by the fact that the rule that towage is not common carriage has its source in cases dealing with towage of manned vessels.[45] Unless the policy announced in *The Syracuse* is to be taken as wholly without meaning, situations of towage of dead vessels, such as this, must remain subject to its operation.

B. The Contract Containing the Standard Towing Conditions, Whether or not Valid as Between the Parties, is not Effective to Alter Liabilities of the Owners of Either the Tug or the Tow to Third Parties.

1. *The Contract as Making the Tugmaster Petitioner's Agent as to Third Parties.*

In *Sturgis v. Boyer* it was argued that, because the tug was merely providing motive power and her master and crew were subject to and obeyed the orders of the master and other officers of the tow, who were aboard their vessel, the fault of the master and crew of the tug was imputable to the tow. This Court however said it made no difference whether all or a part of the officers and crew of the tow

---

[43] *Texas Company v. Lea River Lines, Inc.*, 109 F. Supp. 266, 267, reversed on other grounds 206 F. 2d 55 (C.A. 3, 1953).

[44] 285 U.S. 195, 200 (1932).

[45] *The Webb*, 14 Wall (81 U.S.) 406 (1871); *The Margaret*, 94 U.S. 494 (1876). The rule did not deter this Court in *The Syracuse* from proscribing a tug's exoneration from liability for its own negligence. See brief of petitioner in *Bisso No. 9, et al. v. Inland Waterways Corporation*, No. 50, this term, page 13, n. 26.

were aboard, "provided it clearly appears that the tug was a seaworthy vessel, properly manned and equipped for the enterprise, and *from the nature of the undertaking, and the usual course of conducting it*, the master and crew of the tow were not expected to participate in the navigation of the vessel."[46] (Italics supplied.) After fully examining the nature of the undertaking, (noting particularly that the owners of the tow did not appoint the master or crew of the tug and could not displace them), the Court concluded that under all the evidence the tugmaster continued the agent of the owners of the tug, who alone remained responsible for his actions in her navigation.[47] Summarizing, the Court said:

> "* * * it clearly appears in this case that those in charge of the steam tug had the *exclusive control, direction and management of both vessels*, and there is not a word of proof in the record, either that the tug was not a suitable vessel to perform the services for which she was employed, or that anyone belonging to the ship either participated in the negligence, or was guilty of any degree of negligence whatever in the premises."[48]

This Court in *Sun Oil Company v. Dalzell Towing Company*, applied the standard of direction and control, just as it did in *Sturgis v. Boyer*, and the language of the towing contract was treated as only one of a number of elements entering into its decision. In reaching its conclusion, this Court obviously felt called upon to first satisfy itself that from the nature of the entire undertaking and the usual course of conducting it, the master and crew of the tow not only participated in the navigation of the tow, but controlled and directed the entire operation.

---

[46] 24 How. (65 U.S.) 110, 122-123.
[47] Ibid. 125.
[48] Ibid. 125.

No court other than the district court in this case has ever extended the *Sun Oil* decision to impart conclusive effect to a declaration in the towage contract that the master and crew of the tug are the agents and servants of the owner of the tow so as to permit direct recovery by a third person against the owner of the tow.[49] To the contrary, although that provision has not been frequently invoked as a basis for direct liability of the owner of the tow to third parties, respected admiralty judges and commentators are in complete agreement that agency for this purpose can only be established by the same standards of direction and control applied, just as in *Sturgis v. Boyer*, to *all* the facts in the case, and the *Sun Oil* decision is not deemed to require a departure.[50]

In *Robins Drydock & Repair Co. v. Navigazione Libera Triestina S. A. and Moran Towing & Transportation Company, Inc.*[51] the *Brenta II* was being assisted in undocking by two Moran tugs and, while the master of one of them was aboard directing the maneuvers of the tugs, the ship struck and damaged a dock. The dock owner sued both the tugs and the steamer. Negligence of the tugmaster who boarded the steamer, one Healey, was established, but the tug owner contended that Healey was, as a matter of law, the agent of the ship and not the agent of the towing company by reason of the pilotage clause. The trial court said:

---

[49] Unless the opinion of the Court of Appeals herein can be said to approve this as a basis for decision.

[50] "The liabilities to third persons of the shipowner or of the towing company depend, or may depend, upon whose servant the pilot is. If the pilot's general employer attempts to transfer his services by contract to the shipowner as a special employer for a particular job, the question is whether he thereby becomes the latter's servant as against third persons (see expressions of Supreme Court in *Sun Oil Co. v. Dalzell*, 287 U.S. at 295, 1933 A.M.C. at 37, 38). Certainly it is doubtful whether the special employer would, for instance, have the right to discharge the pilot." Griffin on *Collision* (1949), Par. 197, p. 465.

[51] 154 N.Y. Misc. 788, (1931) aff'd 261 N.Y. 455, (1933) cert. den. 290 U.S. 656.

"* * * as to persons not parties thereto the liability of the defendants must be measured by the actual relation of each of the defendants to Healey at the moment of the accident. That relation must be determined by all the facts surrounding Healey's employment. It is by no means conclusively established by what the parties in the 'pilotage clause' declared those relations to be, * * * The language of the parties could not have been made strong enough to change the essential character of the relation by any change of name. It must be implied from all the surrounding circumstances, even though these may be contradictory or disputed. * * *"

"Tested by these principles, I am of the opinion that as to the plaintiff, Healey, notwithstanding the 'pilotage clause' remained the servant of the towing company. The Columbus Marine Corporation, the agents of the owner of the BRENTA II, engaged the towing company not only to provide tugs suitable for the particular work to be done, but to provide a pilot also. The towing company was informed that the vessel to be 'undocked' was under steam. No suggestion was made to the towing company as to the manner in which the 'undocking' should be carried out or whether or not the ship's own power should be used. When the tugs arrived Healey, who was in charge of the operation for the towing company, immediately boarded the steamer, went to the bridge and assumed command of the situation by directing the movements of the tugs as well as those of the ship. The master and crew of the BRENTA II in executing Healey's orders were mere instrumentalities used by Healey to apply the wheel, the engine and the other instruments of navigation, which in conjunction with the tugs were used to undock the vessel. Control and direction and the choice of methods rested exclusively with Healey as the representative of the towing company. The conduct of all the parties thus rather plainly shows that there was at least a tacit understanding that the Moran Company was engaged to render a general service in

undocking the steamer and was not merely to provide tugs to assist the BRENTA II in the undocking operation. The towing company must therefore be considered an independent contractor in this venture, and since Healey was employed in carrying out its business it is liable to third persons for his negligence."[52]

On appeal Judge Crouch of the Court of Appeals of New York said that under the general rule as announced in *Sturgis v. Boyer*, the tower acts as an independent contractor and is primarily liable for negligent injuries, and, except for whatever effect may be afforded the "pilotage clause", that rule would apply. But, the court said:

> "* * * as such, it has no validity as to third persons. * * * something more, however, is claimed for it. Because it says that the 'tugboat captain becomes the servant of the owners * * * in respect to the handling of such vessel', it is argued that such was in fact Healey's relation to the ship's owner, even when considered in the light of the surrounding facts and circumstances. We do not understand appellant to argue that in and of itself the clause was conclusive on plaintiff. That, of course, would not be so. * * * The question became one of fact and was so determined below; nor did the court in considering the question, lose sight of the contract itself, as appellant asserts. The description which the parties gave to their own relation was weighed against the facts, and the facts were found not to justify that description. We think the finding was right."[53]

Although the Second Circuit subsequently allowed recovery over by the tug owner against the owner of the *Brenta II* on an indemnity feature of the contract, that decision contains nothing which can be construed as less than complete approval of Judge Crouch's opinion, which was

---

[52] 154 N.Y. Misc. 788, 794, 795.
[53] 261 N.Y. 455, 462, 463.

characterized as that "of a most accurate and distinguished judge".[54] Subsequently Judge Clark of the Second Circuit took occasion to point out that the authority of the State Court decision in *Brenta II* "* * * is not impugned by" the outcome of the later litigation in the Federal Courts between the parties to the contract.[55] And the Eastern District of Pennsylvania, in holding that a pilotage clause makes the issue of loaned servant none the less a factual issue, said "we need cite only one case in support of the conclusion we have reached" viz, the Second Circuit decision in *Moran Towing & Transportation Company v. Navigazione Libera Triestina, S. A.* Thus, that court reads the Second Circuit decision as adopting the view of the New York Court of Appeals and as an affirmative holding that a pilotage clause will not relieve the towing company where it will not "set off other circumstances showing that the pilot was tug's servant * * *"[56]

In *Publicker Industries, Inc. v. Tugboat Neptune Company and Tugboat Triton Company* (William J. Worth)[57] both tug and tow were sued by owners of a dock damaged by the steamer through negligence of a tug master directing undocking operations from aboard the steamer. The Third Circuit (having in earlier proceedings[58] vacated a decree entered by the District Court of the Eastern District of Pennsylvania against the vessel owner) affirmed the district court's decree imposing sole liability on the tugs. The Court, citing *Sturgis v. Boyer* and the *Brenta II*, said:

> "* * * in this case the court was justified by the evidence in finding, as it did, that Captain Marvel of the

[54] *Moran Towing & Transportation Co. v. Navigazione Libera Triestina*, 92 Fed. 2d 37 (1937).
[55] Dissenting in *Logue Stevedoring Co. v. Tug Dalzellance, etc.*, 198 F. 2d 369 (CA 2, 1952).
[56] *Winters, Martin, etc. v. Tug H. C. Jefferson*, 69 F. Supp. 650, 651 (1946).
[57] 171 F. 2d 48 (1949).
[58] 165 F. 2d 1002

NEPTUNE directed the undocking operation, giving all the orders involved except for the original casting off of the WORTH, and that he and not Captain Ryder of the WORTH was in general charge of the undocking operation. It thus appears that Captain Marvel was not loaned by the Tugboat Neptune Company to the WORTH and did not come under authority of Captain Ryder of that vessel or become its employee for the time. On the contrary, it is settled that under the circumstances present here the relation of the two tugboat companies to the WORTH and its owner was that of independent contractors". And

"* * * while it was proper for the court to consider the pilotage clause in determining the actual fact as to whether Captain Marvel was in control of the undocking operation or was acting under the orders of Captain Ryder, the clause was not conclusive upon that point and it was, therefore, not error for the Court from the other evidence in the case to find the actual fact to be that Captain Marvel acted throughout as employee and agent of the tugboat companies."[59]

In *Patterson Oil, Inc. v. Tug Port Covington*, wherein libelant's mooring dolphin was damaged as a result of the negligence of both tug and tow, and both were sued, the District Court for the Eastern District of Pennsylvania declined to consider the effect of the pilotage clause which the tug owner contended made the vessel owner solely liable, again stating "the pilotage clause by which the docking pilot became the servant of the vessel and her owners does not affect the tort liabilities of the parties to the libelant, whatever its effect may be as between the two parties to the contract."[60] The court of appeals, affirming, said "* * * the district court refused and properly so, to adjudi-

---

[59] 171 F. 2d 48, 50, 51.
[60] 109 F. Supp. 953, 955.

cate with reference to questions related to the operation of pilotage clause."[61]

In *Logue Stevedoring Company v. Dalzellance, etc.*,[62] the steamer Alston was brought into collision with derricks through negligent handling of the ship by the master of one of the assisting tugs, who was aboard the steamer acting as docking pilot. In a suit by the derricks against the tugs and the tow *in rem*, the majority of the Second Circuit held the Alston liable.[63] Judge Clark, dissenting, said "the authorities do not permit a decree against * * * the owner of the Alston. He criticized the majority decision as an unjustified departure from *Sturgis v. Boyer* and applauded the decisions of the Third Circuit in *William J. Worth* and of the New York Court of Appeals in *Brenta II* as giving proper effect to *Sturgis v. Boyer*. The *William J. Worth*, he said "is the more important since it overrode * * * counter-arguments * * * based on a 'pilotage clause' for indemnity under the contract * * *" The *Brenta II*, he said "states clearly and enforces the principle of the towing concern as the independent contractor."[64]

In the absence of any precedent to the contrary, such substantial authorities as *William J. Worth* and *Brenta II* cannot be lightly discarded. They are not fairly distinguishable as deciding only that the tug cannot shield itself from liability by asserting the pilotage clause. In any case in which all three parties are before the court, the pilotage clause is as much a weapon for imposing liability on the

---

[61] 205 F. 2d 694, 699.

[62] 198 F. 2d 369 (C.A. 2, 1952).

[63] On *in rem* principles as the offending vessel, on authority of *The Helen*, 5 R. 2d 54, without relying on the contract, but to the contrary questioning its relevancy. The District Court had treated the contract as justifying its conclusion that the towing company was an independent contractor, thus affirmatively employing it as a basis for exonerating the tow.

[64] 198 F. 2d 369, 374.

tow as it is a shield for the tug against third parties. The *Brenta II* and *William J. Worth* took proper cognizance of that fact, resting as they do on *Sturgis v. Boyer* which squarely involved the question of liability of the owner of the tow to third parties. They announced a principle requiring holding the tug and exonerating the tow in spite of the contract, and although the Fourth Circuit disclaimed any intention to adjudicate the right of the tug to escape liability, its reasoning would necessarily have resulted in exonerating the tug, had it been in the case.

In spite of any language in the contract, the record herein makes it abundantly clear that "from the nature of the undertaking and the usual course of conducting it," petitioner was not expected to participate in the navigation of this flotilla. Through representatives who were landsmen knowing nothing about the navigation of vessels, petitioner engaged a reliable and established towing concern to perform a specialized job in whatever manner seemed best to it. Both tugs were seaworthy vessels, properly manned and equipped. Both towing companies knew in advance that the destroyers would have no motive power or steering apparatus. It was expressly stipulated that they would "supply the necessary personnel" for handling the vessels, and the Peter Moran in fact carried a crew of 15, only two of whom were on deck at the time of collision. It is not suggested that petitioner would have opposed the stationing of part of this crew on the destroyers, which the tugmaster had ample opportunity to do. The agreement with respect to the intermediate tower contemplated that petitioner was to have no choice in this, and there is no evidence that petitioner even knew who the intermediate tower would be. Neither tugmaster knew anything about the arrangements between their respective towing

companies and petitioner. Both affirmatively testified that they were employees of their respective towing companies, and they reported directly to the offices of those companies. Petitioner did not appoint them, and nothing could be more obvious than that petitioner had no right to discharge them. The Master of Foundation Maritime tug assumed command of the situation from the moment he located the destroyers.[65] He did not find any representative of petitioner on board and had not expected to find any. Neither he nor the master of the Peter Moran asked for any advice from petitioner as to what lights to display, what length of hawsers to use or whether to man the tows. The nature of the undertaking afforded them no opportunity to consult at any time with any representative of the petitioner.

Opposing this is only the bare language of the pilotage clause, and "there is no magic power residing in the words of that stipulation to transmute the real into the unreal. A device of words cannot be imposed upon a court in place of an actuality of fact."[66]

2. *Direct Enforcement of the Contract Against Petitioner as Indemnitor.*

The decision of the court of appeals directly enforcing the contract in favor of a third party against the petitioner as indemnitor is wholly without precedent in the admiralty law.

Sturgis v. Boyer leaves little room for doubt that there can be no direct liability except by application of the doc-

[65] Capt. Dykeman, Master of the Foundation Maritime tug, arrived in Sydney, and took charge of the destroyers at 5:10 A.M. on July 3rd, 1945 (Record p. 261). The letter from Foundation Maritime to Petitioner, containing the standard towing conditions, was dated at Halifax, N.S., July 3rd, 1945. In *The Syracuse*, this Court said "it seemed that the canal boat had been made fast, the tow put in motion and the towage charge paid before this receipt was delivered. What the contract was, was therefore a matter disputed."

[66] *Commercial Insurance Co. v. Ives*, 46 Ill. 402.

trine of *respondeat superior*. There, this Court said "* * * whether the party charged ought to be held liable is made to depend in all cases of this description upon his relation to the wrong-doer." and "* * * liability ceases where the relation (of principal and agent) ceases to exist * * *".[67] Again, the Court said "No such consequences (of liability) follow, however, when the person committing the fault does not, in fact, or by implication of law, stand in the relation of agent to the owners. Unless the owner and the person or persons in charge of the vessel in some way sustain towards each other the relation of principal and agent, the injured party cannot have his remedy against the colliding vessel."[68]

This should have been sufficient to dispose of all other theories as to petitioner's liability to the WINDING GULF, leaving the only feature of the contract bearing any possible relevancy that declaring the master and crew of the tug to be the agents and servants of the owner of the tow. But the Fourth Circuit, in its apparent reluctance to agree with the district court that the contract as a matter of law made the tugmaster petitioner's agent, adopted on its own initiative the indemnity theory of liability. No such argument was made by cross-libelants, who to the contrary, repeatedly disclaimed any intention to rely on the contract *qua* contract, and the district court assumed "that any question of indemnity arising under the contract could not have been litigated here in this case."[69]

Moran Towing & Transportation Company v. Navigazione Libera Triestina, S.A.,[70] does not justify the action of the

---

[67] 24 How. (65 U.S.) 110, 124.
[68] *Ibid.* 124.
[69] Record, page 13.
[70] 92 F. 2d 37 (C.A. 2, 1937), cert. den. 302 U.S. 744.

Fourth Circuit. There the Second Circuit held that the New York Court of Appeals in deciding the *Brenta II* properly did not adjudicate any rights of indemnity under the contract, because, even though both parties were before the State court as co-defendants, in the absence of an application for cross-relief, no such determination could have been made.[71] The Moran case actually emphasizes the error of the Fourth Circuit, and, in fact, was cited by the Southern District of New York in 1951 as authority for stating that a libel by a damaged third party against both tugs and tow "cannot determine" any question as to the tug's right to indemnity against the owner of the tow under the pilotage agreement.[72]

The Fourth Circuit has placed itself in irreconcilable conflict with well-established principles of the law of contracts limiting the right of third persons to enforce obligations under contracts to which they are not parties.

This Court in *Robins Drydock and Repair Company v. Flint*[73] refused to permit recovery by time charterers of a steamship against a drydock company for loss of use of the steamer delayed in drydock because damaged while there through the negligence of drydock employees, the libel having been brought upon the apparent theory that the contract for drydocking between the drydock company and the owners was made for the charterer's benefit and was incidental to the charter party. Justice Holmes said:

> "* * * it is plain, as stated by the circuit court of appeals, that the libelants, respondents here, were not parties to that contract 'or in any respect beneficiaries', and were not entitled to sue for a breach of it 'even

[71] 92 Fed. 2d 37, 40.

[72] *Logue Stevedoring Company v. Tug Dalzellance, etc.*, 98 F. Supp. 276 (D.C. S.D. N.Y., 1951), reversed on other grounds, 198 F. 2d 369 (C.A. 2, 1952).

[73] 275 U.S. 303.

> under the most liberal rules that permit third parties to sue on a contract made for their benefit.' 13 F. 2d 4. Before a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement, to which he is not a party, he must at least show that it was intended for his direct benefit.' *German Alliance Ins. Co. v. Home Water Supply Co.*, 226 U.S. 220, 57 L. ed. 195, 199, 42 L.R.A. (N.S.) 1000, 33 Sup. Ct. Rep 32 * * * the contract of the petitioner with the owners imposed no immediate obligation upon the petitioner to third parties as we already have said, and whether the petitioner performed it promptly or with negligent delay was the business of the owners and of nobody else."[74]

Similarly, in *Isbrandtsen Company v. Local 1291 of International Longshoreman's Association*[75] the Third Circuit denied the right of time charterers of a vessel to sue a longshoremen's union for damages caused by delay in unloading, due to a work stoppage contrary to the provisions of a contract between the union and a marine trade association. The court held that the charterer (not a party to the contract) was neither a "donee" nor a "creditor" beneficiary but, at best, only an "incidental" beneficiary, and said: "We think that *Robins Drydock & Repair Company v. Flint* shows clearly that there could be no recovery under federal authority * * *"[76]

In *In re Gubelman*, it was said:

> "The rule that may be formulated under the federal decisions permits a third person not a party to a contract to enforce the promisor's obligation only where he is the beneficiary solely interested in the promise,

[74] 275 U.S. 303, 307-308.
[75] 204 F. 2d 495 (1953).
[76] The court employed the classification of beneficiaries as used in Restatement of Contracts, pp. 133-147.

and in such case it must appear that the parties intended to recognize the third person as a primary party in interest."[77]

Respondents question the applicability of this principle because the claim on the cross-libel here is for a maritime tort, and does not involve a third party contractual situation.[78] We entirely agree that the principle has no place in the case, but it cannot fairly be said that the *Robins* and *Isbrandtsen* cases are not germane to the treatment of the matter by the Fourth District.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the Court of Appeals affirming petitioner's liability on the cross-libel be reversed, and the cause remanded to the district court with instructions to dismiss the cross-libel and enter decree for petitioner.

JOHN H. SKEEN, JR.,
WILLIAM A. SKEEN,
EUGENE M. FEINBLATT,
Proctors for Petitioner.

---

[77] 13 F. 2d 730, 731 (CA 2, 1926). See also, *Central States Grain Co-op. v. Nashville W. & E. Corp.*, 48 F. 2d 138 (C.C.A. 7th, 1931).

[78] Respondent's brief in opposition to Petition for certiorari, p. 12.

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
FEB 28 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 70

BOSTON METALS COMPANY, FORMERLY NAMED BOSTON IRON AND METAL COMPANY, AS OWNER OF THE CANADIAN DESTROYER "ST. FRANCIS",

Petitioner,

VS.

S/S "WINDING GULF"

AND

MASSACHUSETTS TRUSTEES OF EASTERN GAS AND FUEL ASSOCIATES,

Respondents.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY BRIEF

JOHN H. SKEEN, JR.,

WILLIAM A. SKEEN,
1017 Fidelity Building,
Baltimore-1, Maryland,

EUGENE M. FEINBLATT,
Baltimore Life Building,
Baltimore-1, Maryland,
Proctors for Petitioner.

The Daily Record Co., Baltimore 3, Md.

INDEX

Table of Contents

	PAGE
Question Presented	1
Statement of the Case	2
Summary of Argument	2
Argument	3
Conclusion	8

Table of Authorities

Cases

Calzavaro v. Planet SS Corp. 31 F. 2d 885	8
Dorset, The, 260 Fed. 32	7
John D. Rockefeller, The, 272 Fed. 67, cert. den. 256 U. S. 693	8
Lizzie M. Walker — Virginia (4th Circ. 1925) 3 F. Supp. 921	3, 8
Logue Stevedoring Co. v. Tugs Dalzellance, etc. (CA 2, 1952) 198 F. 2d 369	8
Naamlooze Venootschap, etc. v. Moran Towing & Transp. Co. (2 Cir. 1925) 9 F. 2d 614	8
Ora Ellis-Primavera (CA 2, 1952), 197 F. 2d 607	8
Sturgis v. Boyer, 24 How. (65 U. S.) 110	3, 7, 8

Texts

Griffin on Collision	7
Robinson on Admiralty	7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 70

BOSTON METALS COMPANY, FORMERLY NAMED BOSTON IRON AND METAL COMPANY, AS OWNER OF THE CANADIAN DESTROYER "ST. FRANCIS",

Petitioner,

VS.

S/S "WINDING GULF"

AND

MASSACHUSETTS TRUSTEES OF EASTERN GAS AND FUEL ASSOCIATES,

Respondents.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY BRIEF

I. QUESTION PRESENTED

The "Question Presented" as restated by respondents[1] is unacceptable to petitioner in two respects:

[1] Respondents' brief, pages 5 and 6. Petitioner is satisfied that the opinions below do not support respondents' analysis (at pages 2-5 of their brief) of the reasoning of the district court or of the court of appeals, which analysis culminates in respondents' restatement of the "Question Presented."

First, in that it omits the indisputable fact that at the time of collision the destroyer was under the exclusive direction and control of the tug PETER MORAN and her master and crew; and

Secondly, in that it adds to the "Question" language not justifiable by anything in the record; viz, that "the owner of the tow . . . arranged for the towage with the knowledge that the tower will not light or man the tow and . . . himself has made no provision that those things be done . . ."

II. STATEMENT OF THE CASE

Under "Statement of the Case", respondents say that "Petitioner knew as a fact that they (the master and crew of the tug) would not man the tow or see that her lights were adequate," and that ". . . control of them (the lights) remained with petitioners."[2] This is a gratuitous assumption not acceptable to petitioner for reasons which will be fully developed under Point IV hereof entitled "Argument." (infra p. 4.)

III. SUMMARY OF ARGUMENT

Petitioner also takes issue with respondents' conclusion, under "Summary of Argument", that "The contract shows unequivocally that the area in which the tower was to act did not include responsibility for the lighting and manning of the tow."[3] Under Point IV hereof, "Argument", (infra p. 4) it is shown that this conclusion is unsupported by the record.

---

[2] Respondents' brief, page 6.
[3] Respondents' brief, page 7.

IV. ARGUMENT

A. Reply to Respondents' point A as to "The True Significance of The Contract and the Correct Basis For Petitioner's Liability to Respondents."[4]

Respondents' entire argument under Point A seems to depend on an interpretation of the contract which would deny the existence of exclusive direction and control in the towing company and impute knowledge to petitioner that the towing company would not man or light the tow.

There certainly is no real issue here as to direction and control, whatever the arrangements between the parties may have been or the contract may have provided. It cannot in good faith be contended that petitioner, in fact, had anything to do with the navigation of this destroyer at the time of collision. There was no representative of the owner on board. The existence of *the fact* of exclusive direction and control in the towing company as an independent contractor must be conceded. It is, therefore, doubted that any contract or arrangement (or knowledge thereof by the owner of the tow) could effectively shift the obligation imposed by law on the towing company as an independent contractor to light the tow or man it where necessary in the judgment of the tugmaster, so as to form the basis for direct recovery by a third-party against the owner of the tow. Under the circumstances here, the tug alone was legally responsible for the navigation of the tow, specifically including responsibility for placing lights necessary for its safety and the safety of other vessels,[5] and where collision results from navigational fault neither the tow nor its owner can be held liable.[6]

---

[4] Respondents' brief, pages 8-12.
[5] *Lizzie M. Walker — Virginia* (4th Cir. 1925) 3 F. Supp. 921.
[6] *Sturgis v. Boyer*, 24 How. (65 U.S.) 110.

The "knowledge" that the towing company would not light or man the tow is gratuitously imputed to petitioner throughout Respondents' brief,[7] in the apparent hope that frequent repetition and emphasis will compensate for lack of substance. No inference can fairly be drawn from the record here (which includes the entire contract and all of the testimony as to the manner of performance of the towage), that the towing company was not going to light or man the tow, much less that petitioner had any basis for "knowing" that this would not be done.

The tower's letter to petitioner confirms an agreement on its part as an independent contractor to "supply tug *for the towage*" of petitioner's destroyers,[8] which necessarily carries with it the obligations imposed by law respecting proper navigation of the tow. Further, in conjunction with requiring that all watertight doors be closed and rudders secured amidships, the tower, in its letter, expressly undertook to "supply the necessary personnel for handling the vessels "at such times in the course of the voyage as it anticipated personnel aboard the destroyers might be needed.[9]

The function of the Standard Towing Conditions was merely to fix the circumstances under which, as between tug and tow, the *ultimate* impact of any loss or damage in the course of the towage would fall, and to specify the limits within which indemnity would be recoverable by the tug against the tow. They do not and were not intended to touch upon responsibility for lighting and manning the tow.[10]

---

[7] Respondents' brief, pages 6, 7, 8, 9 and 10.

[8] Record, pages 21 and 22.

[9] Record, page 22.

[10] Record pages 23 and 24. The provision in subpar. 2, to the effect that the tug company only undertakes to provide motive power, when read in proper context, clearly is intended to do nothing more than explain and clarify the circumstances under which the tow was to assume the risk of *its own* loss or damage, and to lay a basis for the stipulation that, *as to loss or damage to the tow only*, the master and crew of the tug are the

But even if the contract had specifically purported to place responsibility for lighting and manning the tow upon petitioner, the conduct of the masters and crews of both tugs in the performance of the towage leaves no room for speculation as to the parties' understanding of where these obligations rested, as between tug and tow. Both tugs brought lights with them to be set in place on the tows, and, without hesitation or inquiry, their masters took the necessary steps to do so.[11] The PETER MORAN, which had the destroyers in tow at the time of collision, carried a crew of 15, only two of whom were then on watch on the tug.[12] Can it reasonably be doubted that with a crew of this size the tower had sufficient manpower available for handling and manning the tow at such times in the course of the voyage as would be necessary or advisable in the judgment of the master?

There is thus no basis, either in fact or law, for application of the rule contended for by respondents that the contract delineates areas of responsibility in such a way as to render petitioner personally liable directly to them. Nothing has been shown which would make inapplicable the authorities discussed in petitioner's brief, pages 14 to 23, which are to the effect that the party responsible in each instance is the one in actual control of the navigation of the flotilla at the time the damage occurs, and there can be no direct recovery against the owner of the tow unless the

---

servants of the owner of the tow. Indeed, the Standard Towing Conditions, as well as the tower's letter, specifically contemplated that the tug's crew *would* be aboard the destroyers during the course of the voyage. (See subpar. 4, Record page 23.)

[11] Record, pages 33, 37 and 39. As it is undisputed that the tug *in fact* set in place the lights which were found inadequate, how could petitioner have "known" that the tower would not light the tow?

[12] Record, page 5.

responsible individual is, in fact, his agent. The rule contended for by respondents is clearly out of place in a towage situation. Divided responsibility in this area is especially repugnant. The unfitness of the rule is well illustrated by the implication of respondents' argument on pages 10 and 11 of their brief that petitioner should be held personally liable because the tow line used by the tugmaster "was of unusual length." Respondents' quote from that portion of Judge Chesnut's opinion which suggests that the "unusual" length of the tow line, imposes an obligation to station riders on the tow, which otherwise might not exist.[13] From this reasoning, it can be inferred that petitioner could have avoided personal liability, if it had prescribed in advance the length of the tow lines to be used. Patently, no rule of law should require the imposition of conditions and restrictions (often by unqualified persons) which would hamper the free exercise of the judgment of the tugmaster in the performance of his duties. Conversely, it is certain that the tugmaster knew at the time he took charge of this tow that nobody else was going to light or man it (whether or not he also knew that someone else was supposed to do this). Respondents would have this court approve a principle which, if carried to its logical conclusion, would condone the conduct of the tugmaster in taking out the tow unlighted, leaving owners of vessels which might be damaged as a result, without recourse against either the tug or the towing company.

B. Reply to Point C of Respondents' Brief

It is contended under Point C of respondents' brief that, even though petitioner be deemed not subject to liability

[13] Record, pages 10, 11.

in personam, it cannot have affirmative relief because the destroyer would have been liable *in rem* had it survived.[14]

Without for a moment conceding that *in rem* liability, if it existed, could bar affirmative recovery, the fact is that the destroyer did not survive, and the court had no *in rem* jurisdiction. And even if it had, there could have been no *in rem* liability under the circumstances of this case. Respondents' argument overlooks the fundamental and well-established distinction between pilotage and towage cases, expressed by Professor Robinson as follows:

> "Giving the ship into the care of a person who operates her from on board risks the ship. But in the towage cases, the ship owner who entrusts his vessel to a tug does not risk her. *She is not subject to maritime lien even if she be the actual instrument of injury.*" (Emphasis supplied.)[15]

In *Sturgis v. Boyer*[16] the tow was the instrument of injury and it survived, but the libel *in rem* was dismissed. Commenting on that case, Mr. Griffin says:

> "Even the fact that though part of the ship's crew was aboard, they kept no lookout, did not render her liable, because the tug alone was in charge of the operation."[17]

The Fourth Circuit, in what has been described as "a series of notable decisions . . . (f)ollowing the general theory of liability of a tug with tow to third parties for misnavigation settled by *Sturgis v. Boyer* . . ."[18] has held

---

[14] Respondents' brief, pages 16-19.

[15] Robinson on Admiralty, page 680, adding, at page 681, that "In the absence of *respondeat superior* liability, the tow was not subjected to liens."

[16] 24 How. (65 U.S.) 110.

[17] Griffin on Collision, page 414.

[18] Clark, Ct. J. dissenting in *Logue Stevedoring Co. v. Tugs Dalzellance, etc.* (CA 2, 1952) 198 F. 2d 369.

the tug and specifically exonerated the tow *in rem* in varying circumstances, in all of which the tow was the offending *res*.[19]

V. CONCLUSION

Respondents have shown no valid reason why the decision of the court of appeals should not be reversed and the cause remanded to the district court with instructions to dismiss the cross-libel and enter an affirmative decree for petitioner for the amount of its damages as found by the district court, and, for the reasons heretofore set forth in petitioner's brief, it is herewith respectfully requested that this be done.

JOHN H. SKEEN, JR.,
WILLIAM A. SKEEN,
EUGENE M. FEINBLATT,
Proctors for Petitioner.

---

[19] *The Dorset*, 260 Fed. 32; *The John D. Rockefeller*, 272 Fed. 67, cert. den. 256 U.S. 693; (fault with respect to sounding of whistle signals by tow) *Calzavaro v. Planet 88 Corp.*, 31 F. 2d 885; See also *Lizzie M. Walker — Virginia* (4th Cir. 1925), 3 F. Supp. 921 (inadequacy of lights on tow); *Ora Ellis-Primavera* (CA 2, 1952), 197 F. 2d 607 (failure to have lookout on tow); *Naamlooze Vennootschap, etc. v. Moran Towing & Transp. Co.* (2 Cir. 1925), 9 F. 2d 614.

LIBRARY
SUPREME COURT. U.S.

Office - Supreme Court, U. S.
FILED
JUN 7 1954
HAROLD B. WILLEY, Clerk

Supreme Court of the United States.

OCTOBER TERM, 1953.54

No. [redacted].70

BOSTON METALS COMPANY, FORMERLY NAMED BOSTON IRON AND METAL COMPANY, AS OWNER OF THE CANADIAN DESTROYER "ST. FRANCIS,"
Petitioner,

v.

S/S "WINDING GULF"

AND

MASSACHUSETTS TRUSTEES OF EASTERN GAS AND FUEL ASSOCIATES,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

CHARLES S. BOLSTER,
SEYMOUR P. EDGERTON,
Proctors for Respondents.

BINGHAM, DANA & GOULD,
1 Federal Street,
Boston, Mass.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

Subject Index.

I. Discussion of "question presented" 1

II. Discussion of aspects of the contract 4

III. Argument 5

1. The contract is not invalid as between the parties 5

2. There is no barrier to giving direct effect to the provisions of the contract in a suit in admiralty by an injured third party against the owner of the towed vessel 9

IV. Conclusion 12

Table of Authorities Cited.

Cases.

Adams v. The Peter Moran, 94 F. Supp. 520 3*n*.

Bisso, Receiver, v. Inland Waterways Corp., 211 F. (2d) 401; 1954 A.M.C. 648 8

Brenta II—Robins Drydock & Repair Co. v. Navigazione Libera Triestine, S.A., 261 N.Y. 455 (cert. den. 290 U.S. 656) 9, 10

Caldarola v. Eckert, 332 U.S. 155 10

Compañia de Navigacion Interior, S.A., v. Fireman's Fund Insurance Co., 277 U.S. 66 5, 6 7, 8

Isbrandtsen Co., Inc. v. Local 1291, &c., 204 F. (2d) 495 12

Kookaburra, The, 69 F. (2d) 71 11

"Margaret," The, 94 U.S. 494 7

Oceanica The, 170 Fed. 893 (cert. den. 215 U.S. 599) 7

Patterson Oil Terminals, Inc., v. The Port Covington, 205 F. (2d) 694 9, 11

Publicker Commercial Alcohol Co. v. Independent Zoning Co., 165 F. (2d) 1002 10

Publicker Industries, Inc., v. Tugboat Neptune Co. (The Wm. J. Worth), 171 F. (2d) 48 9, 10

Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 12

Santa Fe, Prescott & Phoenix Ry. Co. v. Grant Brothers Construction Co., 228 U.S. 177 7

Steamer Syracuse, The, 12 Wall. 167 5, 7, 8

Sturgis v. Boyer, 24 How. 110 3

Sun Oil Co. v. Dalzell Towing Co., Inc., 287 U.S. 291 7, 8

Swift & Co. Packers v. Compania Colombiana Del Caribe, S.A., 339 U.S. 684 11

Ten Eyck v. Director General of Railroads, 267 Fed. 974 7

TEXTBOOKS.

Restatement of Torts, sec. 413 (vol. 2, pp. 1118-1119) 3

Restatement of Torts, sec. 416 (vol. 2, p. 1128) 4

Supreme Court of the United States.

OCTOBER TERM, 1953.

No. 754.

BOSTON METALS COMPANY, FORMERLY NAMED BOSTON IRON AND METAL COMPANY, AS OWNER OF THE CANADIAN DESTROYER "ST. FRANCIS,"

Petitioner,

v.

S/S "WINDING GULF"

AND

MASSACHUSETTS TRUSTEES OF EASTERN GAS AND FUEL ASSOCIATES,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

I. Discussion of "Question Presented."

The petition (on page 2) suggests that the only "question presented" in this case is whether an inert tow, wholly under the direction and control of the towing vessel, can be liable directly to the owners of a third vessel with which the tow collided, "solely by reason of a contract" between

the tug and tow providing in substance that the towing was to be done at the sole risk of the tow, that the owner of the tow would indemnify the owner of the tug for damages to such third vessel, and that the master of the tug was the agent of the owner of the tow.

While that is the only question here raised by petitioner, respondents contended in the District Court, and again in the Court of Appeals, that petitioner, as owner of the tow, was itself negligent, not *solely* by reason of the *legal consequences* of the contract, but because it had itself failed in its own primary duty to "stranger" vessels which might be encountered in the course of the towing operation, and was therefore liable by reason of the *factual* situation arising out of the *arrangements* which were made for the towing voyage, as *evidenced by* the contract. On such approach it is unnecessary to consider at all whether the particular terms of this towage contract are valid or invalid in law as between the parties to it.

The letter from the tower to petitioner and the attached Standard Towing Conditions (Libelant's Exhibit 1; R. App. 1-3) show what the tower and petitioner, as owner of the towed vessel, understood would be *in fact* the method of handling the towed vessel. The tower was "only . . . to provide motive power" (R. App. 3), and to "supply the necessary personnel for handling the vessels through the Cape Cod Canal" (R. App. 2). Petitioner therefore knew that the tower would not undertake to provide any crew for the tow, the absence of which was specifically found as a fault *of the tow* by the District Judge (R. App. 14, 16). Appellant further knew that whatever the tower might do about lighting the tow would be merely a gratuitous undertaking; and failure to have proper lights on the tow was also specifically found as a fault *of the tow* by the District Judge (R. App. 14, 16). Petitioner thus has direct complicity in these defects and resulting faults.

Both courts below chose to rest their respective but consistent decisions [1] primarily on the contract; but we still submit that the obligations of petitioner also rest upon it by reason of the understanding reached between it and the tower as to the *factual* allocation of responsibility as shown by the language of the Standard Towing Conditions.

Had petitioner undertaken this towing operation through an independent tower, without special towing conditions delineating the respective areas of responsibility of each, petitioner might have relied upon the obligation of the independent contractor to take all necessary precautions under the rule of *Sturgis* v. *Boyer*, 24 How. 110. Here, however, petitioner *in fact* had relieved the tower of what would otherwise have been the tower's responsibility. Having made no provision, express or implied, that the tower should take the necessary precautions, and having made no effort itself to do so or to see that those precautions were taken by others, petitioner is itself directly liable for harm caused by the proper precautions not having been taken by anybody.

The rule of law is thus stated in the Restatement of Torts, sec. 413 (vol. 2, pp. 1118-1119):

> "§ 413. Duty to Provide for the Taking of Precautions against Dangerous Conditions Involved in Work Entrusted to Contractor.
>
> "One who employs an independent contractor to do work which the employer should recognize as necessarily creating, during its progress, conditions containing an unreasonable risk of bodily harm to others unless special precautions are taken, is subject to

[1] The decision of the District Court was affirmed by the Court of Appeals and a petition to that court for rehearing was denied. Judge Coxe in the Southern District of New York independently reached an entirely harmonious result (94 F. Supp. 520).

liability for bodily harm caused to them by the absence of such precautions, if the employer

"(a) fails to provide in the contract that the contractor shall take such precautions (as to which see § 416), or

"(b) fails to exercise reasonable care to provide in some other manner for the taking of such precautions."

This is similar to the rule of law stated in section 416 of that Restatement (vol. 2, p. 1128) as follows:

"§ 416. WORK DANGEROUS IN ABSENCE OF SPECIAL PRECAUTIONS.

"One who employs an independent contractor to do work, which the employer should recognize as necessarily requiring the creation during its progress of a condition involving a peculiar risk of bodily harm to others unless special precautions are taken, is subject to liability for bodily harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions."

Petitioner's situation is squarely within the principles of legal liability above quoted. The outcome below can and should be sustained on that ground alone.[2]

II. Discussion of Aspects of the Contract.

The provisions of the towage contract and their application to the facts of this case fall into two distinct categories, as follows:

[2] On such basis of decision, the questions of validity of the contract and of respondents' right to a decree against petitioner become moot.

(*a*) Those provisions whereby petitioner voluntarily agreed to accept all risk of loss or damage, not only to the tow but to the property of third parties, and petitioner's agreement that the master and crew of the tug should become the servants of the towed vessel; and

(*b*) The additional provision that petitioner would indemnify the tug and her owner "against all such damages, injuries, losses and delays, and against all claims in respect thereof."

The provisions referred to in sub-paragraph (*a*), *supra*, underlie petitioner's contention that this particular towage contract is invalid as between petitioner and tower. The provision referred to in sub-paragraph (*b*), *supra*, is that upon which petitioner predicates its contention that (even if the contract is valid) respondents, as injured third parties, cannot have direct rights of redress against petitioner rather than circuitously through the tower.

III. Argument.

1. The Contract is Not Invalid as between the Parties.[3]

In support of its contention that the contract is invalid, even as between the parties, petitioner relies[4] primarily upon two decisions of this Court: *The Steamer Syracuse*, 12 Wall. 167, and *Compañia de Navigacion Interior, S.A.*, v. *Fireman's Fund Insurance Co.*, 277 U.S. 66 (hereinafter referred to as *Wash Gray*).

Syracuse involved a towage contract wherein it was provided that the vessel in tow was to be towed "at the risk of her master and owner" (p. 169). This Court said (p. 171):

---

[3] Sub-paragraph (*a*), *supra*.

[4] Petition, p. 7.

> ". . . if it be true . . . that, by special agreement, the canal-boat was being towed at her own risk, nevertheless, the steamer is liable, if, through the negligence of those in charge of her, the canal-boat has suffered loss. Although the policy of the law has not imposed on the towing boat the obligation resting on a common carrier, it does require on the part of the persons engaged in her management, the exercise of reasonable care, caution, and maritime skill, and if these are neglected, and disaster occurs, the towing boat must be visited with the consequences."

The Court went on to hold that the *towing vessel* was not relieved from liability for *its failure* to exercise reasonable care in handling of the flotilla.

In *Wash Gray* the contract provided that, except for the towing hawser, which was to be furnished by the towing vessel, "All other risk and expense [were] to be borne by the tug" (the "tug" in this instance was the Wash Gray, *the vessel towed*), and that the *towing vessel* "is not responsible in any way for loss or damage to the Wash Gray." This Court there held that the contract did not violate a stipulation in the policy of insurance on the Wash Gray that the insurance should be void if her owner entered into any agreement "whereby any right of recovery of the insured [Wash Gray] against any vessel, person or corporation is released, decreased, transferred or lost . . ." (p. 73). The reason for the holding was that the agreement entered into between the tow and the tower did not relieve *the tower* from liability *for its own negligence*.

In neither of those two decisions did this Court clearly state whether the contract was (1) invalid as violating public policy or (2) merely insufficient by its terms to "release" the tug from liability for its own negligence; but

the Second Circuit has interpreted the decision in *Syracuse* to mean that the "release" language of the towing agreement had not been intended by the parties to include release of the tug from the consequences of its own negligence. *The Oceanica*, 170 Fed. 893 (certiorari denied, 215 U.S. 599). *Ten Eyck* v. *Director General of Railroads*, 267 Fed. 974.

There is nothing in *Syracuse* or *Wash Gray* which requires a conclusion that this Court was there announcing as a rule of public policy that a tower may not exonerate itself by contract from liability for the negligence of its servants. A towing vessel is clearly not a common carrier. *Syracuse* language quoted *supra*. *The "Margaret,"* 94 U.S. 494. Consequently a tower is not subject to the special limitations on freedom of contract which apply to that type of calling. We know of no rule or reason why the contract in the case at bar, which so clearly expresses the intention that the tow should assume *all liability*, including that flowing from the negligence of the master and crew of the tug, should be invalid. As this Court said in *Santa Fe, Prescott & Phoenix Railway Co.* v. *Grant Brothers Construction Co.*, 228 U.S. 177 (a case where the railroad was not transporting as a common carrier), at p. 188:

> "There is no rule of public policy which denies effect to their expressed intention, but on the contrary as the matter lies within the range of permissible agreement, *the highest public policy is found in the enforcement of the contract which was actually made.*" (Emphasis supplied.)

In *Sun Oil Co.* v. *Dalzell Towing Co., Inc.*,[5] 287 U.S. 291, this Court held that a contract for docking a ship with towboat assistance, which contract contained the now

[5] Cited by petitioner (Petition, p. 6).

familiar "pilotage clause,"[6] was valid, and that the shipowner could not recover against the supplier of the tugs for damage caused by the negligence of the tug captain while on the ship acting as docking pilot.

The conclusion is inescapable that this Court in *Syracuse* and *Wash Gray* refused to relieve the towing vessel from liability for the negligence of her personnel because the contract in each instance did not demonstrate with clarity and directness that such a result was intended by the parties. On the other hand, in the *Sun Oil Co.* case it was clear that the docking pilot was to be "the servant of the ship," and consequently that his negligence was to be that of the ship. So also in *Bisso, Receiver,* v. *Inland Waterways Corp.* (211 F. (2d) 401; 1954 A.M.C. 648), the Court of Appeals for the Fifth Circuit sustained the validity of a contract which clearly and unequivocally expressed the intention that the tow would assume responsibility for the negligence of the master and crew of the towing vessel.

There is no room here even to imagine that the parties did not intend that the owner of the tow should be responsible for the negligence of the master and crew of the tug. The Standard Towing Conditions provide that the tug services will be supplied "at the sole risk of such [towed] vessel or craft and of the owners, charterers or operators thereof . . ." (R. App. 2). If this were all, the case might fall within the limitations imposed by *Syracuse* and *Wash Gray*. But the agreement continues: "that the Master and crew of such tug or tugs used in the said services become the servants of and identified with such vessel or craft and their owners, and that the Tug Company only undertakes to provide motive power" (R. App. 2, 3), and further that "The Tug Company will not be responsible

[6] Whereunder a tug master, who boarded the ship and directed her navigation, became the servant of the ship so that the ship was responsible for his negligence.

for the acts or defaults of the Master, or crew of such tug or tugs . . . nor for any damages, injuries, losses or delays from whatsoever cause arising that may occur either to such vessel or craft, . . . or to any other ship or vessel or property of any kind . . ."

Plainly, then, the agreement before us spells out that, as between the parties, the negligence of the master and crew of the tug is that of the owner of the tow. Neither the dictates of public policy nor any possible ambiguity as to the intent of the parties to the contract can afford petitioner any comfort here.

2. THERE IS NO BARRIER TO GIVING DIRECT EFFECT TO THE PROVISIONS OF THE CONTRACT IN A SUIT IN ADMIRALTY BY AN INJURED THIRD PARTY AGAINST THE OWNER OF THE TOWED VESSEL.[7]

Petitioner asserts (Petition, p. 10) that the decision in the Fourth Circuit in the instant case is in conflict with two decisions in the Third Circuit[8] and one decision in the New York (State) Court of Appeals.[9]

In each of those three cases the *tug owner* was asserting his "pilotage clause" contract as a shield against liability to a third person for the negligence of an individual who was found, as a matter of fact, to be performing the tug owner's own work; and in each of them the injured party insisted that the tug owner-employer could not escape liability on agency principles by calling his servant something which in fact he was not. None of those cases holds

---

[7] Sub-paragraph (*b*), *supra*, p. 5.

[8] *Publicker Industries, Inc.*, v. *Tugboat Neptune Co.* (*The William J. Worth*), 171 F. (2d) 48. *Patterson Oil Terminals, Inc.*, v. *The Port Covington*, 205 F. (2d) 694.

[9] *Brenta II—Robins Drydock & Repair Co.* v. *Navigazione Libera Triestine, S.A.*, 261 N.Y. 455 (certiorari denied, 290 U.S. 656).

either that an injured third party may not look to either party to such an agreement who, by the terms of the contract, is himself responsible for seeing that due care is exercised, or that a party to such a contract may disclaim it, after damage has been done, to gain a shield against third party liability. As was said by the Court of Appeals here (R. p. 47):

> "The contract was deliberately assumed and it would be unconscionable for the owner of the tow to repudiate it after the accident occurred."

Moreover, both *William J. Worth* and *Brenta II* (in the New York State Court) involved actions at law. The courts were there dealing with situations presented under common law and code practice, and did not have available the broader equitable features of admiralty procedure and the characteristic ability of the Admiralty Court to meet new situations by molding practice to accommodate results equitably to be desired.

Furthermore, in *William J. Worth* liability was visited upon the respondents there because the negligence of the tug master occurred before he undertook the undocking operation.[10] No defendant operator of the assisted ship remained in the case. The United States, as owner, was never a party, and American-Hawaiian Steamship Company, general agent for the Government, had been removed from the case (165 F. (2d) 1002) on the authority of *Caldarola* v. *Eckert*, 332 U.S. 155. In *Brenta II*, the damages were ultimately visited upon the ship owner by the Second Circuit in an admiralty proceeding based on the

[10] "Both Captain Marvel of the Neptune and Captain Cooper of the Triton were thus rightly found to have been guilty of negligence in proceeding with the undocking operation before ever the former boarded the Worth and undertook to direct that operation." 171 F. (2d) 48, 49.

indemnity feature of the "pilotage clause" contract (92 F. (2d) 37). The United States Court of Appeals there pointed out that no cross-answers, necessary to the determination of the ultimate liability between the defendants, were filed at law in the State Court, and that such issue was never adjudicated.

In *Patterson Oil Terminals, Inc.*, v. *The Port Covington* the Court of Appeals, in affirming the refusal of the District Court to consider the effect of the "pilotage clause" as between the tug owner and the owner of the assisted vessel, did so (in the language quoted on page 11 of the petition) solely on the state of the pleadings, and because of the failure of the tug owner to file a cross-libel or make a proper cross-claim against the owner of the tow. While the views of the Third Circuit in that case seem to confine admiralty pleading requirements within limits which are more familiar to common law than to admiralty practice, that decision affords no basis for review of the decision here.

Courts of admiralty characteristically look to substance rather than to form, and to the equities of a given situation. This Court has recently characterized the admiralty as "a legal system that has been so responsive to the practicalities of maritime commerce and so inventive in adapting its jurisdiction to the needs of that commerce." *Swift & Company Packers* v. *Compania Colombiana Del Caribe, S.A.*, 339 U.S. 684, 691. Avoidance of circuity of action is a desired equitable result, and, as was aptly stated by the Court of Appeals in the instant case (R. p. 48), quoting Judge Learned Hand in *The Kookaburra*, 69 F. (2d) 71, 73, "the admiralty, whose procedure is especially plastic, can skip the by-ways and head direct for the goal."

Petitioner also asserts (Petition, pp. 14, 15) that the decision of the Court of Appeals in this case is in direct con-

flict with the decision of this Court in *Robins Dry Dock & Repair Company* v. *Flint*, 275 U.S. 303.

It appears to us that the *Robins* case,[11] involving as it does a third-party *contractual* situation, is inapposite and not germane to any issue presented here. The cross-libel by these respondents (as owners of the Winding Gulf) against petitioner was not in any sense based upon breach of contract. Their claim here is for a maritime tort; and the contract between petitioner and the tower is material only in fixing the limits within which petitioner assumed the obligation to exercise due care during the towage from Nova Scotia to Baltimore. There is no claim here (as there was in the *Robins* and *Isbrandtsen* cases) by a stranger to a contract based upon the failure of one of the contracting parties to perform its commitments *to the other contracting party*. The courts below in this case did not, as petitioner seems to argue, make petitioner's liability depend upon its failure to fulfill its obligations to the tower. All that they did was to regard the contract as the measure of responsibility, and to give direct effect to the obligations which petitioner had retained or assumed.

IV. Conclusion.

The petition for writ of certiorari should be denied.

Respectfully submitted,

CHARLES S. BOLSTER,

SEYMOUR P. EDGERTON,

Proctors for Respondents.

---

[11] Also *Isbrandtsen Co., Inc.*, v. *Local 1291, &c.*, 204 F. (2d) 495 (Third Circuit).

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
AUG 6 1954
HAROLD B. WILLEY, Clerk

Supreme Court of the United States.

OCTOBER TERM, 1954.

No. 70.

BOSTON METALS COMPANY, FORMERLY NAMED BOSTON IRON AND METAL COMPANY, AS OWNER OF THE CANADIAN DESTROYER "ST. FRANCIS,"
Petitioner,

v.

S/S "WINDING GULF"

AND

MASSACHUSETTS TRUSTEES OF EASTERN GAS AND FUEL ASSOCIATES,
Respondents.

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

CHARLES S. BOLSTER,
SEYMOUR P. EDGERTON,
Proctors for Respondents.

BINGHAM, DANA & GOULD,
1 Federal Street,
Boston, Mass.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

Table of Authorities Cited.

Cases.

Alaska Commercial Co. v. Williams, 128 Fed. 362 4*n*.

Mylroie v. British Columbia Mills Tug & Barge Co., 268 Fed. 449 (1920); affirmed, 259 U.S. 1 (1922) 3

Santa Fe &c. Railway Co. v. Grant Brothers Construction Co., 228 U.S. 177 (1913) 3

Sun Oil Co. v. Dalzell Towing Co., Inc., 287 U.S. 291 (1932) 3

Supreme Court of the United States.

OCTOBER TERM, 1954.

No. 70.

BOSTON METALS COMPANY, FORMERLY NAMED BOSTON IRON AND METAL COMPANY, AS OWNER OF THE CANADIAN DESTROYER "ST. FRANCIS,"

Petitioner,

v.

S/S "WINDING GULF"

AND

MASSACHUSETTS TRUSTEES OF EASTERN GAS AND FUEL ASSOCIATES,

Respondents.

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Respondents file this supplemental brief only because of statements made by the Solicitor General in his "Memorandum for the Respondent" on Petition for Writ of Certiorari in *Bisso* v. *Inland Waterways Corp.*, No. 50, and in

his Petition for Writ of Certiorari in *United States* v. *Nielson et al.*, No. 210, both of which matters are now pending in this Court.

In the *Bisso* case (No. 50) the Solicitor General states at pages 2 and 3 of his memorandum:

> "Together, these three cases present the issue of the validity and effect of the disputed clauses in actions (1) by the tow against the tug, (2) by a third party against the tow, and (3) by the tug against the tow. It may be noted that the United States is peculiarly affected by the confusion which exists in this area, as exemplified by the opposite views which it represented below in *Neilson* (the tow) and the instant case (the tug)."

In the *Nielson* case (No. 210) he states at page 5 of his petition: "There are now pending in this Court petitions for writs of certiorari in two other cases involving similar exculpatory clauses: *Bisso* v. *Inland Waterways Corp.*, No. 50, and *Boston Metals Co.* v. *S. S. Winding Gulf*, No. 70." He further states at page 13 that, as pointed out in his Memorandum in the *Bisso* case, these "three 'pilotage clause' cases which will be before the Court present the issues of the validity and effect of these provisions in actions (1) by the tow against the tug (the *Bisso* case), (2) by a third party against the tow (*Boston Metals Co.* v. *S. S. Winding Gulf*, No. 70), and (3) by the tug against the tow (the instant [*Nielson*] case). The Court thus has the opportunity to render at this term definitive rulings in the three situations which form the great bulk of those involving the widely used 'pilotage clause'."

The above-quoted statements of the Solicitor General are extravagant and misleading.

The *Nielson* case (No. 210) is the only one of the three which involves exculpatory language in the form commonly referred to as the "pilotage clause." The *Bisso* case (No. 50) and this case (No. 70) involve exculpatory language in two *different* types of towage agreement, each covering a particular towage undertaking. Neither the *Bisso* case nor this case involves directly that language in a towage agreement which constitutes the so-called "pilotage clause."

This case (No. 70) differs from most of the earlier cases in that it involves a contract which is clear and unambiguous. In many of the older cases the towage contracts were of doubtful purpose. There can be no reasonable doubt as to what was intended by the parties here.

Moreover, the decision of the Fourth Circuit in this case and the decision of the Fifth Circuit in the *Bisso* case are entirely consistent *inter se* and with this Court's pronouncements in *Sun Oil Co.* v. *Dalzell Towing Co., Inc.*,[1] and in *Santa Fe &c. Railway Co.* v. *Grant Brothers Construction Co.*,[2] cited on page 7 of our brief in opposition to the petition.

In his petition in the *Nielson* case (No. 210) the Solicitor General argues (as petitioner argues here) that the decision of the Ninth Circuit in the *Mylroie* case [3] has "never been erased" (*Nielson* petition, p. 10) and is in conflict with the Second Circuit and possibly other circuits; but the *Mylroie* case involved primarily the construction of an equivocal contract and was decided ten years before *Sun Oil Co.* v. *Dalzell Towing Co.*, which latter decision certainly "erased" any elements of the *Mylroie* decision which may have indicated that, at least in the Ninth Cir-

---

[1] 287 U.S. 291 (1932).

[2] 228 U.S. 177 (1913).

[3] *Mylroie* v. *British Columbia Mills Tug & Barge Co.*, 268 Fed. 449 (1920); affirmed, 259 U.S. 1 (1922).

cuit, a tower could not contract against his own negligence.[4]

The mere fact that there are two other contemporaneous cases involving questions which, while remotely allied with, are not proximately similar to the issues involved in this case affords no basis for granting certiorari here.

The Solicitor General's complaint voiced at page 3 of his memorandum in the *Bisso* case (quoted *supra*) that he was obliged to represent "opposite views" in that case and in the *Nielson* case is irrelevant. In one case (*Bisso*) he represented the tug; in the other (*Nielson*) he represented the tow. Like many another lawyer, his duties occasionally require him to advocate opposite views.

The petition herein should be granted or denied on the particular qualifications of this case for review. We pointed out in our brief why the petition should be denied. The Solicitor General has advanced no pertinent reason why it should be granted.

Respectfully submitted,

CHARLES S. BOLSTER,

SEYMOUR P. EDGERTON,

Proctors for Respondents.

---

[4] The case of *Alaska Commercial Co.* v. *Williams*, 128 Fed. 362, also cited by the Solicitor General on page 7 of his petition in the *Nielson* case and in the footnote on page 2 of his memorandum in the *Bisso* case, was decided in 1904 and involved primarily procedural questions. In any event, it is not in point on the issues here or even on those presented in the *Nielson* case.

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
FEB 9 1955
HAROLD B. WILLEY, Clerk

Supreme Court of the United States.

OCTOBER TERM, 1954.

No. 70.

BOSTON METALS COMPANY, FORMERLY NAMED BOSTON IRON AND METAL COMPANY, AS OWNER OF THE CANADIAN DESTROYER "ST. FRANCIS,"

Petitioner,

v.

S/S "WINDING GULF"

AND

MASSACHUSETTS TRUSTEES OF EASTERN GAS AND FUEL ASSOCIATES,

Respondents.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR RESPONDENTS.

CHARLES S. BOLSTER,
SEYMOUR P. EDGERTON,
ROBERT HAYDOCK, JR.,
THEODORE R. DANKMEYER,
Proctors for Respondents.

BINGHAM, DANA & GOULD,
1 Federal Street,
Boston, Mass.,
NILES, BARTON, YOST & DANKMEYER,
Baltimore Life Building,
Baltimore, Md.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

Subject Index.

I. Question presented	1
II. Statement of the case	6
III. Summary of argument	7
IV. Argument	8
A. The true significance of the contract and the correct basis for petitioner's liability to respondents	8
B. The validity of the contract	12
C. Even if recovery by respondents against petitioner in personam on the cross-libel is improper, petitioner should not be allowed any affirmative recovery against respondents	16
V. Conclusion	19

Table of Authorities Cited.

CASES.

Adams v. The Peter Moran, 94 Fed. Supp. 520	4*n.*
Bisso, Receiver, v. Inland Waterways Corp., 211 F. (2d) 401; 1954 A.M.C. 648	7*n.*
Brady v. Jay, 111 La. 1071, 36 So. 132	11
Collins v. Goodrich, 324 Mass. 251, 85 N.E. (2d) 771	10
Covington & Cincinnati Bridge Co. v. Steinbrock, 61 Ohio St. 223, 55 N.E. 619, 76 Am. St. Rep. 375	11
Davis v. The Esso Delivery No. 13, 100 Fed. Supp. 285; 1951 A.M.C. 1405	18
Drennon v. Patton-Worsham Drug Co., 109 S.W. 218	12
Lake Superior Iron Co. v. Erickson, 39 Mich. 492	10
"Margaret," The, 94 U.S. 494	15
O'Brien v. Miller, 168 U.S. 287	18
Pendergrass v. Lovelace, 57 New Mex. 661, 262 P. (2d) 231	11

Santa Fe, Prescott & Phœnix Railway Co. v. Grant Brothers Construction Co., 228 U.S. 177 15
Sheppard v. Taylor, 5 Pet. (30 U.S.) 675 17, 18
Standard Vacuum Transp. Co. v. City of New York, 10 Fed. Supp. 341; 1935 A.M.C. 275; affd. per curiam, 78 F. (2d) 536; 1935 A.M.C. 972 17
Steamer Syracuse, The, 12 Wall. (79 U.S.) 167 14
Sturgis v. Boyer, 24 How. (65 U.S.) 110 13*n.*
Sun Oil Co. v. Dalzell Towing Co., Inc., 287 U.S. 291; 1933 A.M.C. 35 14, 15
United States v. Nielson, No. 210 7*n.*, 14
United States Steel Products Co., In re, 24 F. (2d) 657; 1928 A.M.C. 513 18
Wash Gray, The, 277 U.S. 66; 1928 A.M.C. 923 14
W. D. Anderson, The, 17 Fed. Supp. 754, 1937 A.M.C. 229, affd. 94 F. (2d) 377, 1938 A.M.C. 288, cert. den. 58 S. Ct. 764, 303 U.S. 658 11

TEXTBOOKS.

57 C.J.S. 362 11*n.*
Note, 21 A.L.R. 1229 10
Note, 30 A.L.R. 1502 10
Restatement of Torts, sec. 413 (vol. II, p. 1118) 11*n.*
Restatement of Torts, sec. 416 (vol. II, p. 1128) 11*n.*

Supreme Court of the United States.

OCTOBER TERM, 1954.

No. 70.

BOSTON METALS COMPANY, FORMERLY NAMED BOSTON IRON AND METAL COMPANY, AS OWNER OF THE CANADIAN DESTROYER "ST. FRANCIS,"

Petitioner,

v.

S/S "WINDING GULF"

AND

MASSACHUSETTS TRUSTEES OF EASTERN GAS AND FUEL ASSOCIATES,

Respondents.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR RESPONDENTS.

I. Question Presented.

Respondents do not agree that the "question presented" is as stated by petitioner.

Petitioner asserts on page 2 of its brief that the "question presented" is whether or not "when an inert tow,

wholly under the direction and control of a towing vessel, is brought into collision with a third vessel and sunk *through negligence of the master of the tug*, . . . the owner of the tow [may] be held directly liable *in personam* to the owner of the third vessel for damage to the third vessel, *solely by reason of a contract between the owners of the tug and [of the] tow*, (to which the owner of the third vessel was a stranger) . . . ," which contract provided ". . . that all towing [thereunder] is done at the sole risk of the tow, that the owner of the tow will indemnify the owner of the tug for damages to third vessels and . . . [that] the master of the tug [is] to be the agent and servant of the owner of the tow." (Emphasis supplied.)

That language above quoted may phrase petitioner's concept of the "question presented" and to be decided here; but respondents contend that petitioner's liability to them is not necessarily or even primarily to be predicated upon any "negligence of the master of the tug": nor does such liability arise "solely by reason of a contract between the owners of the tug and [of the] tow"—at least to the extent that the contract should be determined as establishing legal rights and obligations, as between the tug and tow, from which respondents can obtain any *contractual* third-party benefit.

In order fully to portray our position on the question or questions presented on this appeal, it is desirable (if not indeed necessary) at the outset to analyze the reasoning adopted by both courts below.

The principal issue here is whether or not petitioner (as owner of the destroyer) was itself at fault for the collision and consequently liable *in personam* to respondents.

The *negligence* of petitioner upon which respondents rely is (as found by the District Judge) "that the lights on the

Destroyer were inadequate and insufficient at the time of the collision" and "that it was imprudent not to provide a crew on the Destroyer to attend to the lights and to see that they were kept brightly burning, and to have equipment for the sounding of fog signals to indicate the presence of the Destroyer in this unusually long flotilla." (R. 11.) The District Judge also found "that these faults contributed to the collision." (R. 11.) The District Judge then concluded (R. 12) "that in view of the contract between the Boston Company and Foundation Maritime, Ltd., above referred to, these faults with respect to lights and absence of crew must be *attributed directly to the owner of the Destroyer.*" (Emphasis supplied.) He restated that conclusion by saying (R. 12-13) "that the provisions *and subject matter* of the towage contract legally result in making the faults with respect to the lights and absence of crew on the Destroyer *directly attributable to the owner of the tow* . . ." (Emphasis supplied.) He then somewhat gratuitously added (R. 13) that "the absence of adequate lights and crew upon the Destroyer constituted defaults by the master of the tug who, by the terms of the contract, became in this respect the servant of the Boston Company." His ultimate conclusion (R. 13, near bottom of page) was "(2) that the owner of the Destroyer *was at fault* with respect to lights and absence of crew; . . ." (Emphasis supplied.)

The District Judge was obviously basing his decision upon two lines of reasoning: (1) that because of the arrangements made, as disclosed by the contract, the "faults with respect to lights and absence of crew must be attributed directly to the owner of the Destroyer"; and (2) that even if "the absence of adequate lights and crew upon the Destroyer constituted defaults by the master of the tug" the latter, "by the terms of the contract, became in this respect the servant of the Boston Company."

It is upon the correctness of the District Judge's first conclusion (twice stated) and the first line of reasoning above suggested that we primarily rely. His second conclusion, viz., that "the absence of adequate lights and crew upon the Destroyer constituted defaults by the master of the tug who, by the terms of the contract, became in this respect the servant of the Boston Company," petitioner apparently considers to be the *only ratio decidendi* in the District Court, and in error.

The Court of Appeals evidently appreciated that the District Judge was basing his decision upon each of the two lines of reasoning suggested above, because it said (R. 58, top of page): "The District Judge held . . . that the *owner of the destroyer was at fault* in respect to lights and absence of crew on the destroyer, . . ." (Emphasis supplied.) It also said (R. 59): "The District Judge held that these conditions of the contract [after quoting paragraphs 2 and 3 of the Standard Towing Conditions] *legally resulted in making [these] faults . . . [of] the destroyer directly attributable to Boston Metals,* her owner, AND that these faults might be ascertained in the pending suit without being first litigated in a suit by the Winding Gulf against the tug, because they constituted faults of the master of the tug who, by the terms of the agreement, became in this respect the servant of Boston Metals." (Emphasis supplied.) The Court of Appeals went on to say (R. 61, top) that "*the record* [on that appeal] *supports the findings of Judge Chesnut that both vessels were at fault, for the reasons set out and discussed in his opinion;* and we conclude, as did Judge Coxe in the New York case,[1] that both vessels were at fault

[1] The Court of Appeals also said (R. 59, 60) that in *Adams v. The Peter Moran*, 94 Fed. Supp. 520 (the suit by these respondents against the tug which had the destroyer I-24 in tow), Judge Coxe held "that the provisions of the towing contract making the master of the tug the servant of the owner of the tow merely served

and that the damages should be divided." (Emphasis supplied.)

In addition to affirming the judgment in the District Court on the two grounds set out by Judge Chesnut, the Court of Appeals went on to add a third ground of its own, viz., that "the contract changed the settled rule that a tug is solely responsible for the fault of an inert tow of which it has entire charge" (R. 61); and thereafter it proceeded to speak almost exclusively in terms of the validity of the contract between petitioner and the tower, *qua* contract, and in language indicating that it regarded respondents as third party *contractual* beneficiaries.

However, near the end of its opinion the Court of Appeals reverted to the principle of simple tort liability, saying (R. 63, bottom; R. 64, top): "The contract was deliberately assumed and it would be unconscionable for the owner of the tow to repudiate it after the accident occurred." We believe the Court of Appeals intended those words to mean: "Responsibility for having the tow properly lighted and manned was, under the arrangement evidenced by the contract, deliberately assumed by the owner of the tow; and it would be unconscionable, after the accident occurred, for the owner of the tow to escape liability for the consequences of its negligence by striking down the contract, *qua* contract, as illegal."

With the foregoing in mind, respondents believe that the true question presented is this: When an unmanned tow, without motive power of her own, collides with a third vessel and becomes a total loss, and when the collision is caused in whole or in part by the failure of the tow to exhibit proper

---

to fix the relationship between the tug and the Boston Metals, and could not affect *the liability of the tug or the liability of the tow, as independent vessels, each one liable to the collier for its own fault.*" (Emphasis supplied.)

lights at night and to have a crew on board, may the owner of the tow, who has arranged for the towage with the knowledge that the tower will not light or man the tow and who has himself made no provision that those things be done, be held directly liable *in personam* to the owner of the third vessel, wholly irrespective of concurrent faults on the part of the tug in those respects?

II. Statement of the Case.

Petitioner's "Statement of the Case," appearing on pages 2 through 7 of its brief, requires only two comments:

(1) In the first paragraph thereof (near the bottom of page 2) it is stated that the destroyer I-24 at the time "was an inert tow, unmanned and without motive power, wholly under the direction and control of the tug PETER MORAN." While the master and crew of the tug were the only persons *physically* controlling the movements of the tow at the time, petitioner knew as a fact that they would not man the tow or see that her lights were adequate. Proper lights were a navigational "must," and control of them remained with petitioner.

(2) On page 6 of petitioner's brief (in the paragraph commencing five lines from the bottom of that page) petitioner says that the District Court found that the collision resulted in part from negligence of the master of the tug, and that, "by imputing the fault of the master of the tug to the owner of the tow," the District Court held petitioner liable to respondents on their cross-libel. For reasons pointed out *supra*, that statement constitutes a narrow and in our view a secondary interpretation of the District Judge's opinion. The decision of the District Court (affirmed by the Court of Appeals) can be fully supported

without relying at all upon any imputing of fault of the master of the tug to the owner of the tow.

III. Summary of Argument.

On this phase of the litigation the only significance of the contract lies in its portrayal of the respective areas of responsibility in which the tower and petitioner (owner of the tow) would act during the towage operation. The contract shows unequivocally that the area in which the tower was to act did not include responsibility for the lighting and manning of the tow. That responsibility necessarily remained with petitioner; and since petitioner did not exercise any care whatever in those particulars, it is directly liable to respondents *in tort* for that negligence—wholly irrespective of any faults of the tower and its tug.

Accordingly, the question of *legal validity of the contract* as between petitioner and the tower is really of no significance here because respondents, in order to recover from petitioner, do not have to rely upon any "imputing" of faults of the tug to the owner of the tow by reason of the contract, *qua* contract.[2] If, however, despite the foregoing, this Court feels it necessary to determine that question in this case, the contract is valid.

Even upon petitioner's concept of the "Question Presented," and even if this Court should conclude that direct recovery by respondents against petitioner (on their cross-libel) should not be permitted, petitioner should, in any event, not be allowed any affirmative recovery against respondents in this litigation.

---

[2] The *Bisso* case (No. 50) and the *Nielson* case (No. 210) present issues requiring a determination of the legal validity of the contracts respectively involved in those cases; and the general question of legal validity of a towage contract will be fully developed in the arguments (as it has been in the briefs) in those cases.

IV. Argument.

A. The True Significance of the Contract and the Correct Basis for Petitioner's Liability to Respondents.

In order for any court to determine issues of liability in this sort of case, it is necessary for the court to know the acts to be done by the tug and tow respectively, and particularly to know which of them has assumed responsibility for doing certain things.

For instance, in this very case, who (as between the tug and the tow) had the burden of exercising reasonable care to see that the tow exhibited proper and sufficient lights? That question can properly be answered only by looking at the arrangement which was made between them.

The District Judge properly and necessarily admitted the contract in evidence so that he could determine therefrom the arrangement which had been made and the resulting incidences of responsibility resting upon the tug and tow respectively. After doing so, he readily observed that this case does not involve a situation where a tug tows an unmanned vessel and undertakes *all* navigational responsibilities. On the contrary, the tower here was merely to provide towing motive power supplied by a tug (R. 21, 23) and to supply "the necessary personnel for handling the vessels [*i.e.*, the destroyers] through the Cape Cod Canal."[3] (R. 22.)

By the plain language used in the contract, the owner of the tow was to see that its tow was "in seaworthy condition" for the voyage (R. 22); and the tower said in effect to the owner of the tow: "I will take no action in any way

[3] Although Captain George of the tug PETER MORAN was on both destroyers while they were proceeding through the canal, it is clear that, after the destroyers were put on long hawsers in tandem off the western entrance to the canal and for the trip down Buzzards Bay and to Baltimore, both vessels in the tow were unmanned.

looking toward the proper lighting or manning of the tow, and I will not accept responsibility for any harm that may come, during the towage, either to the tow or to other property (including stranger vessels) by reason of any lack of adequate or sufficient lights on the tow or through any lack of crew. That is your responsibility!" [4]

On our theory of the case there is no need for any judicial determination here of the ultimate legal effect of the agreement exculpating the tug from liability, either directly or *via* the lent-servant or other agency theory. Likewise there is no need for any determination of the validity or effect of the provision in the contract that the owner of the tow will indemnify the tug and her owner from liability, including that resulting from damages inflicted upon third vessels.[5] The contract should be viewed for the sole purpose of determining those areas in which the tug and the tow respectively *in fact* assumed or retained responsibility. We have consistently contended in both courts below, and in our brief in opposition to the granting of the writ of certiorari in this case, that a recovery by respondents here does not have to be predicated upon faults of the tug imputed to the tow or upon any rights supposedly flowing to a third party from the con-

---

[4] Petitioner, on page 22 of its brief, suggests that the owner of the tow was a landlubber corporation and perhaps did not realize what it should or should not do under the arrangement evidenced by the contract. That fact, even if true, affords no excuse. Everyone is in law presumed to know the import of an agreement into which he enters, whether it be in a field of business with which he is familiar or otherwise. Moreover, this suggestion by petitioner comes with little grace since petitioner had for some time prior to this occurrence been in the business of purchasing obsolete destroyers and other vessels wherever it could find them and then arranging for them to be towed to its metal scrapping plant at Baltimore. (District Court's Opinion on Damages, R. 43.)

[5] Those issues will presumably be adjudicated in a proceeding (if ever brought) between the tower and petitioner.

tract, *qua* contract; but rather can be grounded entirely upon *petitioner's own negligent failure* to see in some manner that the tow was properly lighted and manned, irrespective (in these proceedings) of any negligence of the tower.

In other words, if petitioner had arranged for this towing operation without anything in the agreement regarding the respective areas of activity to be exercised by the tug and the tow, it might then have relied upon the tower to take all necessary precautions. Here, however, petitioner, having reached a factual understanding with the tower that the latter need not take the necessary precautions, and having made no effort itself to do so or to see that those precautions were taken by others, is itself directly liable for harm caused by the precautions not having been taken by anybody.

On this aspect, petitioner is liable as a tort-feasor, singly or jointly, to respondents on either of two approaches: (1) Under the arrangement evidenced by the contract, petitioner became directly responsible for manning and lighting the tow, and the tow was not properly manned or adequately lighted. Cf. *Lake Superior Iron Co.* v. *Erickson*, 39 Mich. 492 (1878). (2) By specifically arranging for this towage with the understanding that the tower would not man or light the tow, petitioner was negligent and cannot escape responsibility for that negligence by arguing that the work arranged for was carried out by an independent contractor. Cf. *Collins* v. *Goodrich*, 324 Mass. 251, 85 N.E. (2d) 771 (1949). See also Note, 21 A.L.R. 1229 (1922), and Note, 30 A.L.R. 1502 (1924).

Moreover, the District Judge found that the tug and tow constituted an "unusually long flotilla" (R. 11), and he found by fair inference that "the towage of these two old and obsolete destroyers as a double tow for the long voyage from Sydney, Nova Scotia, to Baltimore, Maryland, . . .

was regarded as particularly hazardous . . ." (R. 12.) He ruled (R. 10) "that as the tow line was of unusual leng[t]h that fact imposed on the tug *and tow* the obligation to use great care to avoid accident." (Emphasis supplied.)

The rule was thus stated by the Supreme Court of Ohio in *Covington & Cincinnati Bridge Co.* v. *Steinbrock*, 61 Ohio St. 223, 55 N.E. 619, 76 Am. St. Rep. 375, as follows:

> "The weight of reason and authority is to the effect that where a party is under a duty to the public or third person to see that work he is about to do or have done is carefully performed, so as to avoid injury to others, he cannot, by letting it to a contractor, avoid his liability in case it is negligently done to the injury of another . . . It is the danger to others, incident to the performance of the work let to contract, that raises the duty and which the employer cannot shift from himself to another, so as to avoid liability, should injury result to another from negligence in doing the work."

See *The W. D. Anderson*, 17 Fed. Supp. 754, 1937 A.M.C. 229 (E.D. Pa.), affirmed 94 F. (2d) 377, 1938 A.M.C. 288, cert. den. 58 S. Ct. 764, 303 U.S. 658; *Brady* v. *Jay*, 111 La. 1071, 36 So. 132 (1904); *Pendergrass* v. *Lovelace*, 57 New Mex. 661, 262 P. (2d) 231 (1953).[6]

Indeed, in cases where the work to be done by another is itself particularly or inherently hazardous, the employer (petitioner here) has a non-delegable duty to take necessary precautions to see that the doing of the work does not harm others; and some courts have said that the party

[6] For a collection of cases involving the liability of the employer where the work contracted for is particularly or inherently dangerous see 57 C.J.S. 362. See also Restatement of Torts, § 413 (vol. II, p. 1118), and § 416 (vol. II, p. 1128).

who otherwise might be an independent contractor then becomes the servant of the employer. This aspect may have been in Judge Chesnut's mind when he invoked his second line of reasoning on the ground of agency. See *Drennon* v. *Patton-Worsham Drug Co.*, 109 S.W. 218 (Texas Civ. Appeals, 1908).

Viewing the contract for the purposes above suggested, the result reached by the District Court, as announced by its final decree (R. 53-55), is sound. That decree was affirmed by the Court of Appeals. A correct result has been reached!

B. The Validity of the Contract.

On our theory of this case, a determination of the validity of the contract between the tower and petitioner, *qua* contract, is unnecessary here. That question will have to be decided only if the owner of the tug PETER MORAN should sue petitioner for reimbursement of any amount which that tug may be condemned (because of *her own faults*) to pay to these respondents in the suit which the latter have brought against that tug in the Southern District of New York.

Regardless of forum or parties, petitioner contends that the contract is invalid in law. It then argues that, because of such invalidity, the situation becomes that of an independent contractor tug, which has the tow wholly under its direction and control.[7] Petitioner thereupon concludes that the tug and tower alone are liable for any damages suffered by respondents.

Assuming *arguendo* that the contract *is* invalid, we have pointed out, *supra*, that the failure of petitioner properly to light or man the tow or to see that it was properly

[7] Even if the contract *is* invalid, the master-servant relationship is not thereby destroyed, since in fact both the tower and petitioner clearly understood such relationship to exist.

lighted or manned by others constitutes negligence of the petitioner itself, and that respondents may on their cross-libel recover directly against petitioner *in personam* their damages resulting from such negligence.

Without asserting that the validity of the contract, *qua* contract, is necessarily to be determined here, we submit that, if and when that question does come before a court in litigation between the parties to the contract, the contract should be declared valid.

In view of the foregoing, and unless this Court feels that it should sustain the judgment of the District Court solely on the latter's conclusion that "the absence of adequate lights and crew upon the Destroyer constituted defaults by the master of the tug who, by the terms of the contract, became in this respect the servant of the Boston Company" (R. 13), and upon the third ground of decision invoked by the Court of Appeals, viz., that "liability of the owner of a tow to third parties may be based on such an agreement . . ." as constituting "a contract of indemnity . . ." (R. 63), the entire argument of petitioner on pages 9 through 27 of its brief strikes us as not germane to the actual issue, for two reasons: (1) it lies wholly outside the scope of *tort liability*, the principles whereof we feel primarily govern the decisions made and should govern the decision to be made by this Court; and (2) that argument is predicated almost entirely upon the assumption that the "tug had the *exclusive* control, direction and management of both vessels"[8] (emphasis supplied), which obviously the PETER MORAN did not have, for reasons pointed out above. Indeed, an analysis of most of the towage cases cited by petitioner shows that in each of those cases the tug was considered by the Court as having "exclusive control" and was therefore both factually and legally responsible for

[8] Language quoted in petitioner's brief, p. 15, from opinion of this Court in *Sturgis* v. *Boyer*, 24 How. (65 U.S.) 110, 122-123.

seeing that the tow exhibited proper lights and was properly manned.

In *Sun Oil Co.* v. *Dalzell Towing Co., Inc.*,[9] cited in petitioner's brief, this Court had before it a "pilotage clause" situation, such as is now before it in the *Nielson* case (No. 210). The basic facts in such a situation are quite different from those in a case involving straight towage. Indeed, this Court expressly noted in the *Sun Oil Co.* case[10] that "the services covered by the contract were less than towage." Perhaps the holding in the *Sun Oil Co.* case might be limited to situations where the pilotage clause language in an agreement is strictly applicable.[11] We do not mean to imply that the result reached in the *Sun Oil Co.* case is not entirely correct, or that, when the question of lent servant is presented *in any case* between the parties to the agreement under which a servant is lent by one of them to the other, the effect of the temporary loan of such servant should not be in accord with the well-established rule in that sort of situation.

Certainly there is nothing in *Syracuse*[12] or *Wash Gray*[13] which compels the conclusion that this Court in either instance was announcing as a rule of public policy that a tower may not exonerate itself by contract from the negligence of its servants.

A towing vessel is clearly not a common carrier. As this Court said in *The Steamer Syracuse:*[14]

---

[9] 287 U.S. 291; 1933 A.M.C. 35.

[10] 287 U.S. 291, 294; 1933 A.M.C. 35, 37.

[11] Such a limitation might tend to eliminate in the future the "confusion" in this general field which has been complained of by petitioner and by the Solicitor General in the *Bisso* and *Nielsen* cases.

[12] 12 Wall. (79 U.S.) 167.

[13] 277 U.S. 66; 1928 A.M.C. 923.

[14] 12 Wall. (79 U.S.) 167, 171.

". . . Although the policy of the law has not imposed on the towing boat the obligation resting on a common carrier, it does require on the part of the persons engaged in her management, the exercise of reasonable care, caution, and maritime skill, . . ."

See also *The "Margaret,"* 94 U.S. 494, 496.

Consequently, a tower is not subject to the special limitations on freedom of contract which apply to common carriers. We know of no rule or reason why this contract, which so clearly expresses the intention that the tow should assume all liability (including that resulting—wholly or partly—from any negligence of the master and crew of the tug and excepting only liability for injury to the tug herself or her personnel), should be invalid. As this Court said in *Santa Fe, Prescott & Phœnix Railway Co.* v. *Grant Brothers Construction Co.*, 228 U.S. 177 (a case where the railroad was not transporting as a common carrier), at p. 188:

"The parties then were free [absent common carriage] to make their own bargain as to this transportation and the liability which should attach to it. There is no rule of public policy which denies effect to their expressed intention, but on the contrary as the matter lies within the range of permissible agreement, the highest public policy is found in the enforcement of the contract which was actually made."

The second sentence of the above-quoted language was quoted verbatim and with approval by this Court in the *Sun Oil Co.* case.[15]

[15] 287 U.S. 291, 294; 1933 A.M.C. 35, 37.

C. Even if Recovery by Respondents against Petitioner in Personam on the Cross-Libel is Improper, Petitioner should Not be Allowed Any Affirmative Recovery against Respondents.

We submit, for the reasons set forth *supra*, that the decisions below should be affirmed and that the case should not be remanded for the purpose of achieving a different result. If, despite our contentions, this Court should conclude that petitioner should not be subjected to liability *in personam* for its negligent failure to see that the destroyer exhibited adequate and sufficient lights and carried a crew, petitioner nevertheless should in no event obtain any affirmative recovery against respondents; and any instructions given by this Court which would result in a modification of the District Court's final decree should guard against such result.

After determining issues of liability on the basis of both WINDING GULF and petitioner at fault, the District Court heard the parties on the question of damages and found "that the fair value of the destroyer at the time of the loss and the consequent damages [suffered by petitioner] for her loss should be fixed at $15,000." (R. 52.) The District Court also found, as set forth in its opinion on damages (R. 46) and in its final decree (R. 54), that respondents, "owners of SS WINDING GULF at the time of the collision . . . sustained damages as a result of said collision in the amount of $18,657.04." Accordingly, respondents' damages exceed petitioner's damages by $3657.04.

If the destroyer had survived, respondents would have had a maritime collision lien against her as the offending *res*, and *she* would have been condemned in damages for *her* failure to exhibit proper lights and to carry a crew. This is so whether or not the tower was an independent

contractor for the reason that somebody must have the burden at any given time of using due diligence to see that a vessel traversing the seas during darkness is properly lighted. It does not matter who that "somebody" is or what the relationship between him and the vessel: if the person who has such burden fails to see that the vessel is properly lighted, the vessel *herself*, as the offending *res*, is at fault for that failure.

In *Standard Vacuum Transp. Co. v. City of New York*, 10 Fed. Supp. 341; 1935 A.M.C. 275 (S.D. N.Y.), a barge in tow of a tug (both commonly owned) collided with a City of New York ferry boat. Judge Patterson held the ferry at fault for failure to keep clear, and also held the barge and the tug each liable *in rem* for the absence of a light on the bow of the barge. He accordingly divided the damages into thirds. He said: "It makes no difference that the barge and the tug were owned by the same party, the libel being *in rem* against both barge and tug and the fault being viewed as that of the vessels themselves as separate offenders." The Second Circuit affirmed *per curiam*. 78 F. (2d) 536; 1935 A.M.C. 972.

In that case, despite the fact that the same party owned both barge and tug, *each* of those vessels was regarded as an *offending res*, compelled to pay her own share of the damages. In this case the destroyer was similarly an offending *res* because she should have carried proper lights supplied by somebody, whether her failure to exhibit proper lights was due to the negligence of her owner, the negligence of the tower (whether or not an independent contractor), or the negligence of both.

In admiralty (as stated by Mr. Justice Story in *Sheppard v. Taylor*) ". . . there is no difference between the case of a restitution in specie of the ship itself, and a restitution in value. The lien [for seamen's wages] reattaches

to the thing and to whatever is substituted for it." [16] This Court later said in *O'Brien* v. *Miller:* "Indeed, that a right of action for the value of the owner's interest in a ship and freight is to be considered as a substitute for the ship itself, was decided in this court in the case of *Sheppard* v. *Taylor* . . ." [17]

That principle has recently been applied in *Davis* v. *The Esso Delivery No. 13.*[18] There a tanker barge collided with an anchored motor boat. The former was undamaged: the latter sank and became a total loss. The latter's owner had nothing to do with her management at the time. Certain guests on the motor boat were injured and sued the tanker barge. On the collision liability aspect, both vessels were found at fault. The owner of the tanker barge then raised the question whether or not it could set off against its liability to the owner of the motor boat the amount of the recoveries against it by those on the motor boat. Judge Coleman concluded that such a set-off was proper, and assigned as his first ground for reaching that result that "it is well established that in admiralty a sum awarded as the value of a vessel is the res that is substituted for the vessel." [19] He went on to say that the "gist of the holding" in *In Re United States Steel Products Co.*[20] "is clearly this: Where one vessel is lost in a mutual fault collision, any claims that could validly be asserted against such vessel may be asserted against any award made to, and in substitution for, that vessel herself." [21]

---

[16] 5 Pet. (30 U.S.) 675 (674), 710.

[17] 168 U.S. 287, 305.

[18] 100 Fed. Supp. 285; 1951 A.M.C. 1405 (D.C. Md.)

[19] 100 Fed. Supp. 285, 289; 1951 A.M.C. 1405, 1411.

[20] 24 F. (2d) 657; 1928 A.M.C. 513.

[21] 100 Fed. Supp. 285, 290; 1951 A.M.C. 1405, 1412.

The amount of petitioner's recovery here will be the substituted *res* for the destroyer, and respondents' claim (which could validly have been asserted against the destroyer had she survived) can be asserted against the award of damages to petitioner in substitution for that vessel. Consequently, respondents can set off their liability to petitioner against petitioner's liability to them; and, the balance being in respondents' favor, petitioner is precluded in any event from making any affirmative recovery against respondents in this litigation.

We concede that this aspect of the matter is not closely related to the issues over which this Court has taken jurisdiction; but it is nevertheless a feature which this Court should have in mind if it should decide, contrary to our contentions, to remand this case with instructions as to a further and different adjudication below.

V. Conclusion.

The final decree of the District Court, affirmed by the Court of Appeals, should be affirmed by this Court, and respondents should be awarded their costs on this appeal.

Respectfully submitted,

CHARLES S. BOLSTER,
SEYMOUR P. EDGERTON,
ROBERT HAYDOCK, JR.,
THEODORE R. DANKMEYER,
Proctors for Respondents.

BINGHAM, DANA & GOULD,
NILES, BARTON, YOST & DANKMEYER.